85-247 (1)

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Lawrence Cranberg
Petitioner

v.

Consumers Union of United States, Inc.,
Respondent

and

Lawrence Cranberg
Petitioner

v.

Associated Press
and
Austin American-Statesman
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COPY

QUESTIONS PRESENTED

In *Cranberg v. Consumers Union of U. S. Inc.:*

1. Whether the district court, in a trial segment lasting a day and a half, did so violate due process as to preclude orderly and proper adjudication of the numerous issues of libel, slander and product disparagement in the pleadings, which included for the first time in judicial history the complex, confused, but publicly vital issues of the efficacy and safety of wood burning for domestic heating (The Anti-Fireplace Hoax); and whether the Court of Appeals erroneously condoned said violations of due process and erroneously endorsed said hoax and a fraudulent "test" of petitioner's fireplace inventions, and violations of the Lanham Act.

In *Cranberg v. Associated Press and Austin American-Statesman:*

2. Whether the district court, in a trial segment lasting a few hours, did so violate due process during the trial, and did make such errors in its decisions on discovery before trial, as to preclude proper adjudication of the libels of an AP story which multiply defamed the petitioner on the pretext of reporting his paper to the American Physical Society, "Encounter with Consumers Union"; and whether the Court of Appeals erroneously condoned said defamations, including the validation of a spurious media event—an alleged "physical struggle" between petitioner and a Consumers Union representative, which the district court called "childish and irresponsible".

In both cases:

3. Whether any U. S. court can designate an individual a "public figure" for purposes of an action for libel and slander, and thereupon apply a distinctive

rule of law to fix liability or damages, absent evidence that the parties have comparable media access on the issues, without violating due process of law and impairing free speech.

4. Whether reference in legal argument to the pro se status of a party by any court or by an officer of any court is inherently as improper and prejudicial as reference to the race, religion, etc., of any party, when made solely for the purpose of justifying abridgment of statutory or constitutional rights, such as trial by the Federal Rules of Evidence, and violates due process and equal protection of the laws.

5. Whether equal justice prevails in our federal court system when the petitioner in this case argued a concurrent case for 18 days in the U. S. Claims Court, and received careful, courteous, patient due process in meticulous accord with the Federal Rules of Evidence, while in the instant cases the Rules of Evidence were deliberately discarded and the Federal Rules of Civil Procedure were repeatedly ignored or abridged.

6. Whether the Judge who was the trier of fact in these cases was an Article III judge, considering his announcement of impending resignation before issue of Final Judgment in these cases, and his public disclosure that he had secretly negotiated his departure from the bench prior to trial of these cases.

THE PARTIES

It is essential to this Petition that careful account be given of the parties, and in particular of the respondents. They are very well known to the general public. But their relationships with one another, which are important to this litigation, are not well known, although the information herein is from public sources.

1. Dr. Lawrence Cranberg, who is acting pro se in this case for economic reasons, is a Fellow of the

American Physical Society with a prolific record of publication, invention and public-interest activity. He was Senior Physicist at the Signal Corps Engineering Labs during World War II, Staff Member at the Los Alamos Scientific Laboratory during the Korean War and thereafter, until taking the positions of Professor of Physics at the University of Virginia, and Director of its Physics Accelerator Laboratory in 1963. Since 1971, he has been in the private sector and is presently owner of Texas Fireframe Co., which manufactures and distributes his patented fire-making apparatus, the Texas Fireframe grate, that is the means of maintaining "The Physicist's Fire"—a patented means of fire-making, based on the first-time application of basic physics principles to the ancient log fire. His public interest activities include co-founding of the Virginia Affiliate of the American Civil Liberties Union (ACLUVA). He is currently a spokesman for what have come to be called "Traditionalist" views in the ACLU, and is often critical of "Activism".

2. Consumers Union is a complex, diversified non-profit operation (i. e., it pays no taxes and is not answerable to stockholders), which heavily advertises its *Consumer Reports* magazine in the mass media. The magazine anonymously reports "tests" on products in the marketplace and often recommends its own variations of those products to its readers. It permits no access to its pages by advertisers who might wish to correct its errors. Its legal representative is Karpatkin, Pollet, Perlmutter and Beil, a firm established by Mrs. Rhoda Karpatkin, who has been Executive Director of CU since 1974. Headquartered on the premises of the law firm is the Libel Defense Resource Center (LDRC), a non-profit (i. e., pays no taxes and is not answerable to stockholders) which enrolls a Who's Who of American media and their libel insurers, including that of AP (Employers Reinsurance Corp-

oration) and of Cox Enterprises (Mutual Insurance Company Limited of Hamilton, Bermuda), the two other respondents in these cases. An open LDRC brochure states that its meetings may be closed to plaintiff lawyers and that it maintains "secret" information files.

3. AP is the "world's largest news organization." It has a de facto dominance of wire service in the U. S. which is comparable to CU's dominance in the field of consumer-product testing. Like CU it is non-profit, and like CU, AP operates on a collective bargaining agreement with New York locals of the Newspaper Guild, AFL-CIO. It controls a worldwide network of 214 bureaus from a headquarters in New York City, where its libel law firm exerts great influence on the media bar through the Practicing Law Institute. AP's control of news is greatly augmented by its exclusive right to local news which originates with its subscriber media. It was represented by Rogers and Wells of New York City and by Brown, Maroney, Rose, Barber and Dye of Austin, Texas.

4. The AA-S is the sole daily newspaper serving the metropolitan area of Austin, the state capitol of Texas, and is the major AP subscriber in the Austin area. It is owned by Cox Enterprises of Atlanta, Georgia. The libel insurer for Cox, Mutual Insurance Co. of Hamilton Bermuda, operates under the highly secret conditions permitted by Bermuda law, and is in addition a supporting member of the Libel Defense Resource Center (LDRC). AA-S and CU were represented in this action by the same Texas law firm, Graves, Dougherty, Hearon & Moody of Austin.

Citations to Opinions Below

The opinion of the United States District Court for the Western District of Texas, on the issue of liability in the two cases which were consolidated for trial and are herein appealed, is given in Appendix A1. The Final Judgments of the District Court taxing plaintiff for costs are given in Appendix A2. The Order of the District Court denying plaintiff's Motion to File Supplemental Complaint relating to violations of the Lanham Trademark Act by Consumers Union (CU) is given in Appendix A3.

The opinion of the Court of Appeals is reported in 756 F.2nd 382 (1985), and is appended as A4. The order denying request for rehearing en banc is A5.

Jurisdiction

The judgment of the Court of Appeals was entered on April 1, 1985. A timely petition for rehearing suggesting rehearing *en banc* was denied on May 14, 1985, and this petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Constitutional Provisions Involved

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

U. S. Const. Amend. I

No person shall . . . be deprived of . . . property without due process of law . . .

U. S. Const. Amend. V.

" . . . nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

U. S. Const. Amend. XIV.

"The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior . . . "

U. S. Const. Article III.

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Federal Statutes Involved

"In all courts of the United States the parties may plead and conduct their own cases personally . . . "

28 USCS §1654.

Federal Rules of Civil Procedure Involved

"If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 25(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses . . . caused by the failure".

Rule 37(g).

Federal Rules of Evidence Involved

"These rules govern proceedings in the courts of the United States and before United States magistrates, to the extent and with the exceptions stated in rule 1101."

Rule 101.

"The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

Rule 605.

Code of Judicial Conduct

"A judge must avoid all impropriety and appearance of impropriety."

Canon 2.

"A judge should be patient, dignified, and courteous . . . "

Canon 3.

"The history of liberty has largely been the history of observance of procedural safeguards." Justice Frankfurter, *McNabb v. U. S.*, 318 U. S. 347 (1942).

"I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation." Justice White in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, U. S. Law Week, 53LW4871, June 25, 1985.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Lawrence Cranberg, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 1, 1985.

Statement of the Cases

The civil action against Consumers Union (CU) was filed in the U. S. District Court for the Western District of Texas, Austin Division, on November 30, 1981, under Texas Statute 5430 against libel, slander, and product disparagement, in consequence of the publication of a defamatory report on Dr. Cranberg's fireplace inventions in the January, 1981, number of *Consumer Reports*, a magazine wholly owned by CU, and of the slanders later directed at Dr. Cranberg by CU employees. The report was captioned "And Sometimes You Lose" (R1).*

The civil action against the Associated Press (AP) and the Austin American-Statesman (AA-S) was filed on April 16, 1982, in the same court, in consequence of the publication of a defamatory article in the AA-S on April 24, 1981 (R2), based on a defamatory AP wire story, (R3), with defamatory AA-S additions. Both actions were filed only after all efforts to obtain corrections came to naught.

The AA-S story purported to be about a scientific paper presented to the American Physical Society by Dr. Cranberg at its regular Spring Meeting in Baltimore on April 23, 1981. The paper, titled "Encounter with Consumers Union" (R4) dealt in detail with the scientific and legal history and modus operandi of Consumers Union, and was fully documented. The AA-S story was captioned "Fire-grate Inventor fights with Consumer Group Official". It included none of the scientific and legal content of the paper. The headline referred to a "physical struggle" which allegedly took place between Dr. Cranberg and CU's spokesman,

* All references to the record below, including docket record, exhibits, transcripts, and any other material to which judicial notice is appropriate under Rule 201, Federal Rules of Evidence, are designated R1, R2 . . . etc. in this Petition.

journalist D. C. Berliner, who showed up unexpectedly at the Meeting, with assistant Sylvia Helm. Each had a tape recorder concealed on their persons.

Federal jurisdiction was based on diversity of citizenship in both cases. They were consolidated for trial under Judge Garcia and in March, 1983, were reassigned to Judge Shannon in San Antonio, who presided over a two-day trial on September 13-14, 1983. Supplementation of the record was permitted until September 26, 1983. On the following day Judge Shannon told the Chief Judge that he was resigning from the bench effective January 1, 1984.

The Facts in the Cases

In December, 1974, prompted by the energy crisis precipitated by the oil embargo, Dr. Cranberg addressed the problem of applying basic physics principles to understanding and improving the domestic log fire. He discovered (R11) a new combustion phenomenon he called "Slot-flame Stability", which is observed in a fire produced in a log cavity. The cavity is created by having a large back log, with two smaller logs in front and an upper log independently supported above the front logs, all logs parallel, of similar length, and adjacent logs in contact with each other.

Viewed in profile the cavity is "C"-shaped. In three dimensions the cavity is slot-shaped. Dr. Cranberg discovered that when kindling is ignited in that slot-shaped cavity or furnace, a number of novel phenomena are observed. These include remarkable ease of ignition of the logs. Unsplit oak logs can be ignited by putting a match to a few sheets of newspaper stuffed in the cavity. Steady burning ensues with the following features: flames are rooted in the lower front logs, but are confined from above by the upper log; the side of the back log facing the cavity becomes a wall of uniformly red-hot coals readily visible through the

flames on the front logs; and the flames and coals exhibit remarkable left-right uniformity shortly after starting. That uniformity is self-maintained until the front logs are consumed—hence the term slot-flame stability. Most dramatic of all is the intense beam of radiant energy which streams from the open end of the cavity into the room in which the fireplace is located. Its directionality can be readily sensed by passing one's hand across the beam.

All the foregoing phenomena are readily observed and duplicated, but not one of them is alluded to in CU's report of Dr. Cranberg's work in the January, 1981, number of *Consumer Reports,* (R1).

In Dr. Cranberg's first experiments, the upper log was supported by wooden chocks or bricks. Recognizing that slot-flame stability could be maintained indefinitely, given some means of supporting and replacing logs without materially interrupting the fire, a proper means was devised for doing so called the "Texas Fireframe grate". This is a grate-like device made of welded steel bars. It has a lower level for supporting the back and front logs, and an upper level whose height above the lower level is adjusted by means of friction-locking arms. The arms attach to two vertical members welded to the front of the grate.

The arms support the upper log at a prescribed height, and make it possible to replace the back log by allowing it to drop in place from above. Thus what was dubbed the "Slot Fire" can be maintained indefinitely, and becomes a practical, inexpensive means of fire-making which requires no tending other than replacing logs sequentially as they burn out. Further, it is obvious that because the fire is capped from above, the risk of chimney fires—the nightmare of all fire-using homeowners—is greatly diminished (R12). One of the key documents in this case which was completely ignored by both lower courts was a letter (R13) from

the petitioner's liability insurer stating that he had never had a claim against him!

The grate and fire-making method were introduced into the marketplace in September, 1975, and a patent was applied for. It duly issued: "Apparatus and Method of Combustion," U. S. Patent No. 4069808 (R14)—the only U. S. patent ever issued on a *method* as well as an apparatus for fire-making. It now has only ten more years to run, and its life is ebbing while this court battle is being waged to defend it from the slurs of totally incompetent critics who have gravely injured it in the marketplace.

The first media account of the slot fire appeared in a very favorable eye-witness description in AA-S for September, 1975 (R15). The first scientific account was given to the American Physical Society at its regular Fall Meeting in October, 1975 (R16). So enthusiastic was the response, that a month later Dr. Cranberg introduced himself to the science staff of *Time* magazine at its New York headquarters, to whom he repeated the account of the slot fire he had given to his colleagues. "The Physicist's Fire" appeared (R17) in the science section of the international edition of *Time* for Dec. 22, 1975.

That launched the product in the marketplace, and there was extensive media coverage thereafter, all of it favorable (R18). In 1978, Dr. Cranberg fought off (R19) an attempt by Sears, Wards and Penneys to pirate his invention. The only detractor to appear on the scene was a Dr. Jay Shelton, who has since become famous as "The Guru of the Woodstove Industry", and the most persistent promoter of what Dr. Cranberg calls "The Anti-Fireplace Hoax"—or "The Hot Air Hoax"—the contention that a fireplace is energy counter-productive because of the large amount of warm air it allegedly consumes from the house (R20). To counter that propaganda (no numbers were being

given), in 1979 Dr. Cranberg designed and introduced the Ventabox (R21)—an accessory which permits use of outside air with the Texas Fireframe grate. At the same time, the Ventabox permits easy ash-removal, so that with a fifty-dollar grate and a forty-dollar Ventabox one has the best of all worlds, in a combination not even approached by any other product on the market.

The Ventabox brochure was made a part of the instruction package (R22) accompanying every model of the Texas Fireframe grate, model U-25, sold thereafter, and it was part of the package purchased on the market by CU when it obtained two units for test in mid-1980. That such purchase was made and that a report was impending was learned in October, 1980, (R23), when a CU representative called Dr. Cranberg to ask for confirmation of pricing data.

Dr. Cranberg then sent CU a number of documents, including a special trade release (R24) emphasizing the benefits of the slot fire with a glass screen, and a preprint of a paper, "Domestic Fire and its Improvement: Some qualitative insights" (R25), which had been accepted for publication in the *American Journal of Physics*. When this article appeared in June, 1981, it was the first publication on the log fire in a refereed scientific journal in modern times. The article also gave all the quantitative data then available, including that of Dr. Shelton, which showed that a slot fire 25 inches long had about a 30% efficiency for converting energy of wood combustion to useful radiant energy for home heating, or about 2.6 times greater than a conventional fire, with an estimated efficiency of 42% for a much longer fire, or one with reflecting ends.

The business of Texas Fireframe Co., which was operated by Dr. Cranberg and his wife, with all manufacturing done on contract, prospered until January, 1981. With the publication by *Consumer Reports* of

a feature on fireplace add-ons in which the Texas Fireframe grate was singled out for special criticism in a separate, specially captioned article "And Sometimes you Lose" (R1), the business of Texas Fireframe Co. plummeted (R25a) and has not recovered to this day. The article claims that the Texas Fireframe grate, albeit an improvement on the conventional grate, is still a "loser", since it delivers only 5000 BTU per hour but causes a loss of 7500 BTU per hour in warmed air, for a net loss of 2500 BTU per hour. It was also compared unfavorably with CU's own log configuration (R26), nowhere clearly described, which it called its "Standard Fire", which it claimed was a break-even proposition in terms of heat loss-gain, and required no grate of any kind.

CU's report included a sketch which accurately presented the Texas Fireframe grate and log arrangement described above. But testimony at trial by CU's "engineer", R. Stube, (R26a), and the evidence of CU's notebook (R26b) showed that there was a single run on heat output by a student, Steven Hertzberg, who evaded subpoena. The notebook's two-page entry of Aug. 1, 1980, shows that Hertzberg used smoothly sawn, 4-inch-square wood blocks of irregular lengths that were about half the length of the grate, in a configuration that crudely approximated the slot geometry of petitioner's invention. Testimony by CU "engineer" Greenhaus (R26c), who was responsible for heat loss measurements, showed that *no* heat loss measurements were ever made on petitioner's inventions, or on any fire made with a conventional grate. A single heat loss measurement was made on CU's Standard Fire. That heat loss was proven (R27) to be huge—about half a ton an hour. And Greenhaus attributed that same heat loss to all fireplace fires made with usual grates and the Texas Fireplace grate!

The facts, proven beyond dispute at trial by mea-

surements by Terralab (R27), an industrial test laboratory with ten years of pertinent experience, are that the slot fire delivers 12,000 BTU per hour on a steady basis, that it consumes warm air at a rate of 500 BTU per hour, for a net *gain* of 11,500 BTU per hour, compared to CU's net *loss* of 2500 BTU per hour. CU's "error" in attributing the heat loss of the Standard Fire to the slot fire was a whopping 2200%!

When the secrecy and confusion which surrounded the actual configuration tested by CU as its grateless Standard Fire were finally penetrated by discovery, tests by Terralab showed (R28) that it was a "two-hour bonfire" with dangerously high flue-temperatures, that consumed fuel at 5 times the rate of the slot fire and air at a 23 times higher rate. Expert testimony (R29) compared the fuel arrangement of the standard fire to one used by our forces during the Vietnam war to destroy enemy stores. Its peacetime use is best described by calling it "The Arsonist's Fire" (R30).

Thus, an efficiently warming fire representing an important advance in fire-making technology was represented by CU as a chilling device, and was compared unfavorably to what is essentially an instrument of destruction.

What is genuinely chilling, however, is the acceptance of CU's results as "accurate" by the lower courts, (A1, A4), and in particular by the Court of Appeals, which accepted them without reservation.

The data on air loss provided by Terralab (R27) on the slot fire demolishes once and for all the contention of the media and CU that the fireplace is a voracious consumer of warm air. In fact, it has now been shown (R27a) that the slot fire consumes air at a substantially lesser rate than the so-called "air-tight" wood stove.

CU's article made no mention at all of the Venta-

box, and the benefits of use of the slot fire with glass screens were converted into a negative, with an inscrutable comment that the Texas Fireframe grate could not be used at all with glass screens! The abundantly proven ease of operation (R31) was converted into a claim that the fire needed much tending. Not a word was said about safety, ease of starting, distinctive aesthetics, etc. In fact there was not a single positive word in the entire article. Dr. Cranberg identified 28 different defects in the article and the list was quickly compiled. They are part of the pleadings in this action, (R32).

Dr. Cranberg immediately made contact with CU in early January, 1981, to determine how the tests were run and what the configuration of the Standard Fire actually was (R33). An appointment to visit CU's lab was made and then was quickly broken by CU, with all matters referred to its attorney, Michael Pollet of Karpatkin, Pollet, Perlmutter and Beil. A letter of Jan 6, 1981, to Pollet, (R34), urged prompt action to limit damage, and requested compensation of $1,000 per day for damage already done "to cause minimum damage to CU as well as myself", and refers to Dr. Cranberg's "long involvement in liberal causes".

Dr. Cranberg then tried to reach the media (R35), which had previously published information widely at variance with CU's report. But by the end of January, it was obvious that all access to media and to CU were closed off, and that the only open channel of communication was a contributed paper to the American Physical Society. Its Spring Meeting was scheduled for April in Baltimore, and the deadline for submission of Abstracts was imminent. On Jan. 19, Dr. Cranberg wrote a letter (R36) to Pollet telling of his intentions unless he had a reply to his previous letters and several phone calls. Not having a reply by the deadline date,

Dr. Cranberg sent to the American Physical Society his two-hundred word Abstract, R37, as prescribed by the Society, entitled "Encounter with Consumers Union". It emphasized the vagueness of CU's anonymous report with respect to the Standard Fire, and CU's refusal to clarify it or to permit access to its laboratory. The Abstract said nothing about CU's attack on the Texas Fireframe grate. It began "Anonymous CU inventor(s) claim a 'standard fire' with fuel arranged on the floor makes all existing grates obsolete".

Copies of the Abstract were quickly sent off to employees and officers of CU, with a letter of invitation, (R38), to attend the Meeting and to participate in public discussion. The Abstract was duly published in the April, 1981, number of the *Bulletin of the American Physical Society*, (R39), where the place and time of presentation were fixed for the Baltimore Convention Center on Apr. 23, 1981.

Arriving in New York City in early February for a variety of purposes, Dr. Cranberg sought and obtained an interview with CU's lawyer, Michael Pollet, in the latter's office on Feb. 12, 1981. Pollet obligingly supplied a sketch of the CU's "Standard Fire", (R40). Dr. Cranberg promptly labeled it inoperative, and alerted Pollet to the fact that the CU employee who supplied the sketch, Richard Greenhaus, was not a member of either of the professional societies in which he had claimed membership during a phone conversation with Dr. Cranberg on Jan. 5, 1981, of which a contemporary record was supplied to Pollet (R41).

With the sketch as clear evidence that CU's tests were meaningless, Dr. Cranberg brought it to the attention of several media reporters, but none ever used it or referred to it in any way, including the *Wall Street Journal*, which on April 9, 1981, published a short article (R42) on the controversy, on the impend-

ing presentation of a paper to the American Physical Society about it, and stating that CU would not send a representative to the Meeting.

Starting in February, 1981, Dr. Cranberg undertook a far-ranging investigation into the history and modus operandi of CU from its antecedent, Consumers Research, Inc., in the late twenties to the present, for a comprehensive presentation to the American Physical Society. Of crucial importance was the accidental discovery in late March, 1981, that CU had lost its first libel suit to Bose Corp. of Framingham, MA. The decision of Judge Julian in that case, *Bose v. CU* 508 F. Supp. 1249 (D. Mass. 1981), pending since 1971, was a revelation in at least two senses: it revealed extremely important facts about CU editorial and testing policies about which very little was generally known, and it revealed how the media had effectively ignored the suit and its unique outcome.

The text of "Encounter with Consumers Union" (R43)—one thousand words of CU history, the Bose case, CU's work on fire-making, etc., with fifteen extended footnotes, three figures and an Appendix summarizing all information to date on fireplace efficiency, showed clearly how inconsistent CU's results were with all previous data, and it revealed a great deal else about CU never before gathered together in one place, and was largely unflattering. This document was completed in early April, 1981, and a dozen copies were made, each boldly marked at the top of the first page: "Release Date: Apr. 23, 1981".

After the appearance of the *Wall Street Journal* article of Apr. 9, 1981, AA-S sent reporter Abrams and a photographer to Dr. Cranberg's home for an interview. Abram's response to the news about the *Bose* case, and to several other features of "Encounter with Consumers Union" was so hostile, that Dr. Cranberg called the AA-S city editor, Ed Crowell, and pre-

vailed on him not to publish any article on the interview (R44).

The *Wall Street Journal* article also triggered calls from reporter Robert Kasper of the *Baltimore Sun* (R45) and from Robert Klein of the Time-Life magazine *Money*. Both requested copies of the paper and an interview. Copies of the paper were sent out immediately. The later interviews revealed keen hostility to the decision in *Bose*, and discovery in this case later revealed that Klein sent a copy of "Encounter with Consumers Union" promptly to CU on receiving it on April 13, 1981 (R46).

Discovery and testimony at trial (R47) showed that the New York City headquarters of AP also responded to the WJ story, and directed its Baltimore Bureau to cover Dr. Cranberg's paper.

Discovery and testimony at trial also showed that CU's Assistant Director for Information D. C. Berliner, and counsel Michael Pollet, on receipt of a copy of Dr. Cranberg's paper from Klein, proceeded to prepare a seven-page rebuttal, (R48), and permission was sought and obtained from the Executive Secretary of the Society (R49), to make a special presentation to the Meeting of the American Physical Society immediately after Dr. Cranberg's scheduled presentation.

Present before, during, and after the presentation of Dr. Cranberg's paper in Baltimore on Apr. 23, 1981, with official responsibility to maintain the authority and decorum of the American Physical Society, was its Deputy Executive Secretary, Dr. David W. Kraft (R50).

Prior to the presentation of Dr. Cranberg's paper and Berliner's rebuttal, Dr. Cranberg was interviewed (R51) by C. Sullivan, an AP reporter, and J. Bready, a senior editorial writer for the *Baltimore Sun*, who was present as representative of *Discover*, the science magazine of the Time-Life-Money family. Sullivan

was accompanied by AP photographer Joe Giza, and a photographer from *Discover* magazine was also present.

During the Cranberg-Sullivan-Bready interview, Dr. Kraft (R50) called to Dr. Cranberg's attention a tape recorder that had been planted to record the interview. It quickly developed that the recorder had been placed by Ms. Helm, who quickly retrieved it. Dr. Cranberg requested (R51) that Ms. Helm actuate the recorder and permit him to record a message for delivery to Director Karpatkin of CU. As she held the recorder, Dr. Cranberg dictated a message emphasizing the impropriety of "surreptitious recording" at meetings of the Physical Society. A crowd gathered as this was happening. Suddenly, on the outer fringe of the crowd, a panic-stricken Berliner appeared, holding a second recorder aloft and shouting "Look, I've got one too. So what!" (R52).

Thus, Berliner was nowhere near Helm's tape-recorder or Dr. Cranberg, and the later contention by Berliner-Sullivan that there was a "physical struggle" over a tape-recorder between Berliner and Cranberg, as reported in the AP story that went out on the national wire that evening from Baltimore, (R3), is pure fabrication. It was a media event devised by two media representatives who came to the dignified premises of a scientific meeting for purposes which had nothing to do with science, and was for the very obvious and effective purpose of creating a distraction from "Encounter with Consumers Union," (R53). Equally false was Sullivan's statement that Dr. Cranberg had refused to provide a list of his objections to CU's treatment of his inventions, and that he had in effect tried to blackmail CU by threatening exposure at the Meeting. This latter blow was aimed at Dr. Cranberg by Berliner, (R54), who shamelessly coupled statements from letters to Pollet of Jan. 6 (R34) and Jan. 19,

1981, (R55), on two different subjects, giving no indication that they were wrenched not only from the context of those two letters, but from an entire correspondence (R56) whose obvious intent was to harmonize differences by colleguial dialogue[1]. Sullivan's story, (R3), repeated Berliner's poisonous insinuation of blackmail with no word from Dr. Cranberg in rebuttal. Robert Kasper's story in the *Sun* (R57) said not a word that implied blackmail or a physical struggle or withholding of data.

One of the most remarkable features of the news coverage of "Encounter with Consumers Union" was that not a word appeared either in the AP story (R3) or in Kasper's story, published a few days later in the *Baltimore Sun*, about the *Bose* case, which Berliner and Cranberg had discussed at length in the meeting. A single sentence in the seventh paragraph of the AP story covered Dr. Cranberg's expose of the inoperability of the CU standard fire as disclosed by Pollet. It was omitted from the AA-S printed version (R2) so that essentially nothing but libels about Dr. Cranberg appeared in his home-town newspaper as the result of "Encounter with Consumers Union", and not a single word adverse to CU appeared in that paper, —not even the fact that CU had barred Dr. Cranberg from visiting CU's laboratory (58).

In deposition (R59) Berliner asserted that after leaving the Meeting in Baltimore, he went home. But this left a gap in his story which forced him to admit that in fact he went to the AP bureau headquarters in

[1] Such dialogue did in fact take place when CU's counsel Pollet gave Dr. Cranberg a sketch of the grateless fire in his office on Feb. 12, 1981. Nothing was said or implied about blackmail or pressure of any kind at that time. CU devised its shabby attack two months later in order to distract attention from "Encounter with Consumers Union" and its disclosure of CU's loss in *Bose*.

Baltimore—there to give Sullivan a document which neither of them ever identified. It is the obvious nexus that accounts for the fact that Berliner-Sullivan are the only people ever to surface and claim that there was a "physical struggle" over a tape recorder on the premises of the American Physical Society.

Nevertheless, at the end of the two day trial in district court on Sept. 13-14, 1983, every negative statement made about Dr. Cranberg and his invention by CU, AP and AA-S was endorsed by the court as true (A1). The only caveat entered by Judge Shannon was that even if CU's numbers on the Texas Fireframe grate were entirely wrong, there was no malice, Dr. Cranberg was a "public figure", there was no liability and all charges were dismissed "with prejudice".

The decision of the Court of Appeals was even more sweeping (A4). There was no caveat about a possibility of errors in CU's report, and every adverse finding by the lower court was affirmed. All due process objections were held invalid, and Judge Shannon's resignation from the bench the day after the closing of the record in this case was not deemed relevant to his standing as an Article III judge.

The findings of both lower courts completely ignore the expert testimony presented, (R60), all of which came from the plaintiff's side, and they ignored the crucial findings of Terralab (R28) that CU's Standard Fire was a "two-hour bonfire" with dangerously high flue temperatures, and that CU made an error in its estimate of the heat loss of the slot fire of 2200%!

REASONS FOR GRANTING CERTIORARI

In Cranberg v. Consumers of U. S. Inc.

1. The basic reason certiorrari should be granted in this case is that on the record, and indeed on the very face of the record, it is obvious that the proceed-

ings of the lower court were extraordinarily hurried, and they bore no meaningful resemblance to a trial in the ordinary sense of the term. The case most nearly precedential to this one, *Bose v. CU*, also a bench trial, lasted 19 days. Given the greater complexity of the technical issues in this case, and the presence of public safety and health issues not present in *Bose*, 19 days would have been a lower limit for the duration of a trial in accordance with normal procedures.

The Court of Appeals has itself characterized the trial procedures as "unusual," (A4) but its enumeration of those unusual features is seriously inadequate. It will suffice to consider the following:

a. The safety hazards of fire are as old as man's use of fire itself. The "Physicist's Fire" represents, among other things, a major breakthrough in solving (R13, R22) the major safety hazard associated with domestic use of fire—namely, chimney fires. The fact that the Physicist's Fire is capped from above and its flames cannot ignite creosote accumulated in the flue from previous fires, is a life- and property-saving achievement of major proportions which was completely ignored in the CU report. It was fully spelled out in the pleadings. But such was the disorderly proceedings at trial that not a word appears in the trial record about safety!

Hence, when the court permitted supplementation of the record, safety was a leading item in that supplementation. The fact that safety is nevertheless completely absent from the decisions of both lower courts testifies to the inadequate standard of care of the lower courts in dealing with this case.

b. CU did not pretend that its "engineers" were experts, and although it said at one point that it would call Dr. Shelton, it never did, so that it presented no expert testimony at all. Thus, there was no valid basis in the record to counter the criticisms of CU's test re-

sults as "meaningless" and "unreasonable" by two experts of unquestioned standing in the fields of heat transfer and combusion—Prof. John Howell (R62) and Dr. Gerald Hurst (R63), respectively, not to mention the substantial credentials (R64) of the petitioner himself. How, then, can a due process decision in favor of CU have been arrived at? The answer to be found in the record of the trial is that Judge Shannon himself served as CU's expert (R65, Tr. 2-101-130). He testified repeatedly in the record on technical matters relating to heat transfer and combustion in the course of repeated attempts to control and to rebut the plaintiff's testimony, and in clear violation of Rule 605 of Federal Rules of Evidence. The other source of rebuttal testimony was CU's defense counsel, whose brief (R66) in rebuttal of the trial experts is repeated verbatim in the decision of the Court of Appeals—for example, "that neither had performed any actual tests". This is a rebuttal opinion pregnant with completely unfounded assumptions about what constitute proper tests and is a mere slur on the theoretical and experimental testimony (R67, R68) of bona fide experts. Its acceptance by the Court of Appeals is tantamount to testimony by the Court of Appeals and again there is violation of Rule 605 cited above. Even more objectionable than the mistreatment of expert testimony is the astonishing neglect of the tests of Terralab (R28) which exposed CU errors of 400% and 2200% in measurements for which CU's "engineers" claimed (R69) accuracy of 3%!

When the Court of Appeals repeats defense counsel's arguments (A4) that plaintiff's in situ tests were invalid, they are both acting as self-appointed experts and are giving improper testimony which is not to be dignified by rebuttal.

c. The lower court controlled testimony (R65) in the CU case so that it was almost entirely devoted to

one aspect of the domestic fire—what the Court of Appeals calls "efficiency". Thus the court affirmed that "consumers' magazine's tests of a number of fireplace devices to determine their efficiency as domestic heat sources were an accurate approximation . . ." A4.

The closest pertinent dictionary definition of "efficiency" is "The ratio of the energy delivered by a machine to the energy supplied for its operation."

But when the petitioner tried to explain the signficance of "efficiency" for the problem of domestic heating, he had uttered only the first words of a definition he has given countless times in elementary lectures when Judge Shannon interrupted (R70) with the words "Doctor, really, I think you guys are way ahead of me. You are only going to make things worse", and no definition of "efficiency" was ever given in the record. Only Judge Clark and his clerk know what they mean by the word. The decision of the Court of Appeals (A4), is void for vagueness, as is the entire opinion of the district court in its discussion of the Physicist's Fire, CU's Standard Fire, or the fire made with an ordinary grate. Simply put, CU's Standard Fire is a two-hour bonfire (R28, R29), and comparison of its heat output with that of any other fire which burns fuel at a much different rate is meaningless so far as "efficiency" is concerned.

No comparison between the heat loss of the Standard Fire and of the slot fire, as defined by copyrighted, patent-protected instructions, was possible since the latter was never tested. And since there was not a single run on the Texas Fireframe grate in accordance with instructions, no meaningful report was possible, and the data published by CU on petitioner's invention were fraudulent. For the lower courts to characterize CU's report as "accurate" is not to give ordinary words their due meaning and is thereby a violation of due

process of law.

d. The record of Dr. Cranberg's testimony (R65) shows that he was *never* cross-examined. Judge Shannon took on the role of examining counsel *for both sides*, after Dr. Cranberg agreed to accept him as friendly counsel for the giving of his testimony. But instead of allowing Dr. Cranberg to testify on the many issues defined in the pleadings which he was prepared to address, Judge Shannon confined the testimony to the issues selected by CU for presentation, and aggressively argued with Dr. Cranberg (R65) on the various technical points at issue, acting in effect as defense counsel and expert witness for the defense, filling the void created by the absence of expert witnesses for the defense, and idling the seven defense lawyers in the courtroom. In page after page of the record, (R65), Judge Shannon acted in violation of Rule 605, Federal Rules of Evidence, which bars testimony by the judge. This is a rule to which exception is "automatic" and need not be taken at trial.

e. The district court exonerated CU of all malicious intent (A1). Dr. Cranberg had characterized the report on his invention as "not a report but an assault with intent to kill" (R65a). He cited *Bose*, and other sources (R43) to show that CU caters to "voyeurism", indulges in "muckraking" and depends, on "sarcasm and spice" to sell its magazines. And in this particular case, CU's consultant Dr. Jay Shelton had a long history of ties to the wood-stove industry and of promotion of the Anti-Fireplace Hoax. The lower court's comments about CU's purity of motive are therefore gratuitous and merely reflect personal bias. Also reflective of personal bias are adverse personal remarks directed at Dr. Cranberg (A1) relating to his concern for public causes. Those remarks are more understandable in the light of the later news that Judge Shannon had already decided to leave public service.

f. The lower courts' denial of petitioner's motion to try a complaint against CU for violation of the Lanham Act was a denial of due process. The issue was broached well in advance of trial. Although the motion was presented just before trial, a similarly timed motion at a preliminary pretrial conference by the defense to remove a sanction against it was granted on the spot with no chance for study of the motion or rebuttal by the plaintiff. In these circumstances the district court's delay in responding to plaintiff's motion is not a valid justification for its denial, particularly when the issue involved an established practise of CU of recommending its own alternatives to marketplace products.

g. Finally, we note that in *Williams v. Lee*, 358 U. S. 217, 218, the Court granted certiorari because there was an "important question" and because of a "doubtful determination" of the court below. There can be few clearer instances of plain error than in the embrace by the lower courts of the preposterous contention that a fireplace acts in cold weather as the refrigerator of the "heated" space. This is a classic instance in which unacceptable procedures produced an unacceptable result, and where certiorari is the last life-line between the courts and the rational, responsible treatment of an important question. The importance of wood-energy is to be gauged by its very wide use in American homes, by the fact that it accounts for more than 70% of all the renewable energy sources in use in the United States, and by the fact that its contribution (R71) to the national energy budget is comparable to that of nuclear power.

2. In *Cranberg v. Associated Press and Austin American Statesman.*

Before either of these cases came to trial it was obvious that Judge Shannon was not going to permit

proper discovery of AP personnel. The Court signed a Protective Order in AP's favor (R72) while Dr. Cranberg was in New York City to take depositions at AP headquarters which had been properly noticed. He then suggested that Dr. Cranberg file a Rule 37 Motion (R73) to punish AP for failing to cooperate in the formulation of a proper plan of discovery, but the Court never acted on the motion and never permitted any AP discovery other than that of reporter Sullivan. The only sanctions invoked have been against Dr. Cranberg, for costs (A2).

The refusal of discovery is in clear violation of the precedent in *Herbert v. Lando*, 441 U. S. 153 (1979), and by itself is ample grounds for remand and re-trial. Not only is there direct evidence of the involvement of AP headquarters in the decision to do a story on "Encounter with Consumers Union", but indisputable evidence was reluctantly extracted from witnesses Berliner and Sullivan that they had consorted together at AP's Baltimore bureau. Their activities there remain to be discovered.

Another unresolved mystery awaiting discovery is the content of AP's libel insurance policy, which should have been produced in November, 1982, under Rule 26(b)(2) of the Federal Rules of Civil Procedure. Its discovery was ordered by the Court, (R14), but AP simply stonewalled and the court refused to act against it. AP has verily been a law unto itself in this case thus far, and the only hope that it will be called to account in this case is favorable action on this petition.

On May 7, 1985, Chief Justice Burger, in an address to the American Society of Newspaper Publishers in Miami,[2] warned of "anarchy in the law" if the Supreme Court continues to be deluged with cases. He

[2] "Court's caseload risks anarchy in the law, publishers are told", Tom Fiedler, Miami Herald, May 8, 1985, p. 17.

warned that the lower courts might ignore upper court rulings in expectation they would not be overruled, and he stated "some careful observers, some responsible observers think this is already happening".

Not only has this already happened in this case with the defiance by the district court of the discovery precedent established by *Herbert v. Lando*, (R75), and the complete neglect of the issue by the Court of Appeals, but "anarchy in the law" is the most eloquent description of the trial of both of these cases.

A "trial" is by definition a trial of issues raised by a plaintiff in pleadings. Due process requires the orderly process by which those issues are presented through the stages of a) pre-trial hearing and pre-trial order, b) opening statements, c) presentation of the case in main by the party having the burden of proof.

All three elements were absent from the proceedings in Judge Shannon's courtroom and there was therefore no orderly trial of the issues, but a helter-skelter process aptly characterized as "anarchy in the law", and epitomized by Judge Shannon's ruling "Everyone has a running objection to hearsay and they are all overruled" (R76).

Chief Judge Clark of the Court of Appeals, in giving its decision, cited his own prior opinion in *Ruiz v. Estelle*, 679 F.2d 1115, 1129, *modified* 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U. S. 1042, 103 S.Ct. 1438, 75 L.Ed. 795 (1988), to justify the "unusual procedures" (A4) in this case. But none of the three elements of fair trial identified above was absent in the *Ruiz* cases, nor was there any such blanket abandonment of the Federal Rules of Evidence as has just been cited from the record of these cases. In any case, to compare the trial of *Ruiz*, which lasted a full year, with these astonishingly abbreviated cases is to compare a whale with a minnow. It is as disingenuous as the finding that AP had no motive to concoct a media

event which cloaked its fellow non-profit journalists from embarrassment so painful as to bring them running to a Meeting they had promised not to attend, climaxed by their public exposure in the scandalous "bugging" of Dr. Cranberg at the scientific meeting. The key trial testimony devoted to the issues involving the Austin American Statesman is (R77) as follows:

Dr. Cranberg: Mr. Crowell hasn't testified yet.

The Court: Who?

Dr. Cranberg: Mr. Crowell, the city editor of the Austin American Statesman.

The Court: Don't call him on my account.

Dr. Cranberg: Well, I know the hour is late...

Thus the court was prepared to give a decision on a case in which it had denied Summary Judgment without hearing from a single witness concerning the issues in the Austin American-Statesman case.

The few hours devoted to testimony in the AP case showed there was no denial by the defense that Dr. Cranberg correctly summarized Sullivan's testimony as follows (R80):

"You have twice refused to take a polygraph test, you produced three different versions of what allegedly transpired, you refused to re-enact the scene (of the physical struggle) . . . "

In an era in which discriminatory reference to age is widely deplored and is the subject of the Age Discrimination in Employment Act (R81), the following words from the decision of Judge Shannon in this case deserve to be widely cited as an example of how judges should not render decision:

"The young man, I don't know how young he is, but the young man here from the AP, I believe the young man, I think he is telling the truth" (A1).

It should be observed that these are the words of a judge who had not yet reached his 41st birthday.

The "physical struggle", according to Berliner,

(R86) occurred in the course of a series of pictures taken of a mock conversation between Cranberg and Berliner to accomodate the photographer from *Discover* magazine. Neither the pictures nor the identity of the photographer was disclosed at trial. The photographer is now known and her pictures are now available. They would be an extremely important contribution to the record of a re-trial of these cases. Their absence from the trial below is one direct result of the refusal of the district court to permit essential AP discovery as required by *Herbert v. Lando.*

Judge Shannon, in his insensitive concluding remarks, observed of the "physical struggle" that it made the participants seem equally "childish and irresponsible" (A1), completely ignoring CU's diversionary motive and Dr. Cranberg's senior status.

3. The scientist as public figure

The district court found the petitioner to be a public figure and concluded as follows (A1): "Consumers Union—if I am wrong about the truth of the article . . . even to a gross extent, completely wrong, figures are entirely reversed—I just don't see any malice".

The Court of Appeals, on the other hand, found all the contested statements true, declared (A4) that it was "unnecessary to reach the issues of whether Cranberg was a public figure or actual malice existed".

But the reasoning of the lower court in making its public figure determination finds its way into judicial precedent, and that reasoning is as follows (A1):

> **"Dr. Cranberg, rather than depending on the Court to resolve this matter in a libel or slander action or disparagement of product action, you elected to go public yourself and address a convocation of physicists . . . and even called attention of the press in advance . . . that made you a public figure and their subsequent writings are to be tested by the standard of malice, and the young man, Sullivan, was not malicious, was not a malicious person, not toward you in this case."**

Clearly these lower court findings are a far cry from reasonable standards of judicial competence and the preference of the courts for non-litigative remedies. Justice Powell, in *Gertz v. Welch*, 418 U. S. 344 put the matter thus:

"The first remedy of any victim of defamation is self-help".

But following Judge Shannon, we can expect instead of polite discourse at professional meetings a mud-slinging match unrestrained by any threat of legal action. The courts are thus making new rules for the entire professional community which in *New York Times v. Sullivan* the Supreme Court had adopted for journalists—namely, that in the discussion of public questions it was desirable to be "uninhibited, robust and wide-open."

At the same time that the Court reviews the public figure finding in this case, it should surely review the argument presented by the petitioner to the lower court (R90) that no determination of public figure status can be even minimally faithful to the intent of *New York Times v. Sullivan* without a determination of the relative degrees of media access of parties to a public controversy. These cases, in which a lone scientist is pitted against three giants of the media, exhibit in the starkest possible terms the absurdity of a public figure finding whose origin was in the idea of a fair fight between equals. The descriptions given of the respondent parties in this Petition reveal not only how formidably powerful each one is in its own domain, but how interlinked they are. And there is a further, sinister aspect to the secret operations of the Libel Defense Resource Center located on the premises of the law firm which has long represented Consumers Union and shares legal staff with it.

A re-consideration of *New York Times v. Sullivan* should also take account of the ways in which that de-

cision may have affected the fact-finding processes of the lower courts in media cases. Those effects are obvious in that decision itself, where the Court, with unaccustomed speed, not only overturned two hundred years of libel law, but then proceeded to apply the new rule of law to the facts in the case, and, finding no actual malice, exonerated the *New York Times*.

It is particularly pertinent in the context of these very expeditiously handled cases to ask what effect *New York Times v. Sullivan* has had on the quality of fact-finding in cases such as these, in which the judge was the fact-finder. Does *Times* send a signal to the lower courts that not only is a free press a precious right, but that it is more precious than almost any other, including the right to due process, and that "the end justifies the means"?

Thus, the granting of certiorari in this case would not only open up the overt issues created by *New York Times v. Sullivan*, which were recently discussed at length in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, but it would focus on a contagion which has spread into due process that has given the public a cynical view of courts intent on vindicating the press by fair means or foul. It is a contagion with an obvious remedy: reversal of the decision in *New York Times v. Sullivan*. Not only would such action put an end to two decades of inordinate confusion in our courts over the law of libel, but it would have a sobering effect on our media, which, under modern technological conditions, have become a fourth arm of government which threatens to be the most powerful of all. That power is plainly shown to extend to our lower courts in these actions, where the evidence is entirely *against* the media, but the courts were entirely *for* the media.

An important fact about libel clearly brought out in these cases and overlooked in *New York Times v. Sullivan* is that libelous falsehoods do not merely affect

the individual who is its target, but also the collective interests which are obscured or damaged as a consequence. Redress of such dangerous error should be prompt and effective. Dr. Cranberg's demand for $1,000 per day until a retraction appeared was a prudent and responsible action considering the stakes involved both for him and for the public, which was being grossly misinformed and being led toward products (woodstoves in this case) which were clearly dangerous.

New York Times represented a risky compromise with truth in exchange for benefits which have never been shown to be substantial. The "chill" of First Amendment rights that was feared from libel suits against the media had the same kind of factual foundation as the myth that the fireplace itself is a chilling device.

4. Pro Se Rights in the Fifth Circuit

At no time did the district court fault the competence of the pro se party before him for any defect of scientific or legal knowledge. On the contrary, Judge Shannon asked the plaintiff to explain the precedential case, *Bose v. CU* (R91) and the judge asked several questions which revealed complete ignorance of the case, although it had been cited numerous times in pre-trial briefs. There is no evidence in the record that the presiding judge had any greater command of the law or of courtroom procedure than the plaintiff.

Nevertheless, the Court of Appeals justified "unusual procedures" by stating (A4): "the judge's participation and evidentiary rulings tended to assist Cranberg, a *pro se* litigant who represented himself well, though he lacked familiarity with procedural rules". And again in discussing the irregularity of the trial, the Court of Appeals asserted, (A4):

"When a pro se litigant, even one as skillful as Cranberg, goes to trial against a party represented by a member of the bar, the responsibility of the trial judge

may warrant participation which differs markedly from what would be appropriate to a trial between adversaries represented by counsel."

The foregoing justifications for unusual procedures are not an exculpation of them but an aggravation of them, unsupported as they are by a word of justification from statutes or cases, or the record of the cases. They are a bitter pill to swallow in the light of the fact that all has been given to the respondents and the petitioner has been taxed for costs, while his livelihood has been damaged and his reputation has been besmirched by both lower courts. If this decision stands, a precedent will have been established that renders worthless the right of self-representation in any court.

In singling out the pro se status of the petitioner as a pretext for "unusual procedures", the court followed an argument in the brief of AA-S' counsel to the Court of Appeals (he was also counsel to CU)—namely, that what happened at trial "was appropriate with a pro-se party and in a non-jury context" (R93). That statement, in all its self-serving arrogance, unsupported by a single relevant precedent, is a further clear warning that this case is a fundamental threat to the hallowed right of self-representation in our courts.

Self-representation is a statutory right (28 USCS § 1654) deeply rooted in our own history and in the common law. It is vital to "Equal Justice under Law" in an era when only the very wealthy and the very poor can afford professional legal representation. In an age of expanding literacy and ever-increasing standards of education, it is ever more likely to be competently exercised.

The pro se party, who is most familiarly characterized as a "fool" within the very bosom of the legal profession, as a group is at least as deserving of proper preservation of its legitimate rights as any other. And to speak with obvious condescension of rights "ap-

propriate with a pro se party" in legal arguments to a court of law (R93) is an affront which should not bear repetition in any proceeding before a U. S. Court.

5. Equal Justice in the U. S. Claims Court.

It was the remarkably good fortune of the petitioner in these cases to plead a cause (*Cranberg v. The United States,* Case No. 417-81C) before Judge Robert M. M. Seto concurrently with these cases. The trial lasted eighteen days. A decision is being awaited. But on one vital point—due process—the verdict has already been entered as far as this pro se party is concerned. That verdict is an unambiguous finding that pro se rights are recognized by some judges and by some courts in the federal system, and that the difference between what happened in Judge Seto's court in Washington, D. C. and in the court of Judge Fred Shannon on Sept. 13-14, 1984, in San Antonio, Texas, is the difference between due process and a "docket-clearing exercise."

The contrast extends from pre-trial and discovery, to a trial in meticulous accord with rules of evidence, to post-trial briefs. The disparity in post-trial proceedings is particularly noteworthy in view of the comment of the Court of Appeals (A4) that "On the other hand, the court also permitted the parties to make a liberal supplementation of the record of the trial; Cranberg admits his supplementation was 'massive' ".

The facts are that petitioner made massive supplementations in timely manner on Sept. 26, 1983, (R97, R98), but so far as the records of both cases are concerned (R99) both sank without a trace. What has been neglected is veritably scandalous, including test data, safety data, and proof of the fraudulence of Defense Exhibit N, attributed to Lawrence Berkeley Laboratory.

6. Article III Judge.

On Sept. 29, 1983, local newspapers carried the story that District Judge Shannon had unexpectedly an-

nounced his intention to resign from the federal bench effective Jan. 1, 1984. Petitioner promptly prepared a Motion for New Trial and New Judge with an extended brief (R100) arguing that Judge Shannon had ceased effectively to be an Article III judge—i. e., a judge serving for good behavior. This motion was filed prior to issue of Final Judgment (A2) in these cases, which was entered on Oct. 19, 1983. The Motion was denied shortly thereafter by Judge Shannon.

The brief on this question gave numerous arguments and cited *Northern Pipeline Construction Co. v. Marathon Pipeline Construction Co. and U. S.*, U. S. Sup. Ct. Rep, 73. L. Ed.2d, p. 598, and especially Note 10. This citation was ignored by the Court of Appeals.

The number of judges leaving the federal bench has increased dramatically in recent years (R101). It would be eminently timely for the Supreme Court to grant certiorari in these cases and to indicate that it will have no tolerance for "docket-clearing" actions. Parties with pending cases—especially those in which the judge is fact-finder—should know that their judge is not a lifetime judge, and should have the option of transfer to someone who is a lifetime judge.

The Court of Appeals (A4) denied the Article III argument on the ground that no substantive impropriety was proved. But it ignored the issue of *appearance* of impropriety which is explicit in the Code of Judicial Conduct, Canon 2, and was surely in the minds of the authors of Article III of our Constitution in providing lifetime tenure for federal judges.

It disturbs appearances when a judge takes control of a non-jury case from one judge, who has been handling the case to the satisfaction of one side, and then throws his weight conspicuously on the other side. The disturbance is greater when the latter judge surprises everyone by announcing intention to resign from the bench six months later. It disturbs appearances

still more if said judge then rules *against* the favored side on summary judgment, and then holds a trial in which he is fact-finder which is the *most summary* imaginable, but in full support of those denied summary judgment.

Summary and Conclusion

A suggestive analogy to these cases is that of *Nader v. General Motors*, with fire-safety in place of auto-safety, "Encounter with Consumers Union," in place of "Unsafe at any Speed", and with powerful corporate entities resorting to scandalous means to discredit critics. The greatest difference is in the legal outcomes thus far. Certiorari could remedy that difference.

New York Times v. Sullivan can be viewed in retrospect as a Noble Experiment in enlarging the discretion of the press. But like another Noble Experiment—that with the Eighteenth Amendent—it has proven flawed by a lack of realism about competing interests, human frailty, and problems of enforcement. It is time that both Noble Experiments met the same fate, and certiorari is an available means.

There is a striking resemblance between the alleged "chilling" effect of libel suits on First Amendment rights and the alleged chilling effect of the fireplace. Neither has any evidence to support it worth mentioning; both are actively promoted by the media; and both are reckless abandonments of common-sense and age-old principles and practices.

It would be sweet and economical justice if recognition of the truth about the fireplace were also to be the occasion for reversing *New York Times v. Sullivan*, for preserving and vindicating the usefulness of pro se action, and for safeguarding the integrity and consistency of standards of the federal bench. Certiorari in these cases could yield all those benefits.

Respectfully submitted,
Lawrence Cranberg

Appendix A1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LAWRENCE CRANBERG

vs. A81CA496 and A82CA208 consolidated

CONSUMERS UNION
ASSOCIATED PRESS and **AUSTIN AMERICAN STATESMAN**

Proeceedings Held Sept. 14, 1983:

Court's Pronouncements and Rulings

JUDGE FRED SHANNON: Ladies and gentlemen, do you want to know what I think about it now or in the morning? Doctor, today or tomorrow?

DR. CRANBERG: Today.

MR. DONALDSON: On behalf of the Austin American Statesman, we simply need to get into the record some exhibits and some testimony from Dr. Cranberg concerning his public figure status and also it is important to ask a couple of questions on cross-examination.

THE COURT: Okay. I am ready to call it.

MR. DONALDSON: In that case, if I could merely have the exhibits marked and introduced into evidence—

THE COURT: Each side can perfect the record however they desire to do so. I may not be able to come to the correction decision in every case but each side of the case can be certain that I will help you get into the record anything you want to appeal the case.

Dr. Cranberg, you are a good man with a good invention, but in my judgment you do not have a good lawsuit, and the reasons are several:

Start with the analysis done by Consumer's Union. Could have been better, they could have done more tests, but I did not have a test that refutes their findings; so, in my limited scientific ability, I have to assess what they have done on my own. What they have done—although I can't verify the figures up here, but looking at the results of the test, it squares, it is consistent with logic. Closed windows over a fireplace, I think it is clearly demonstrated that you are going to keep more heat in the house; everybody agrees to that. If you burn a fireplace while you have got your central heat running, you are wasting energy. Everybody knows that. That is your practice as I recall from your testimony. Either reduce your central heat or turn it off while you are consuming the wood.

The second column, although the numbers may not be corect exactly, demonstrate that. You don't burn a fireplace without windows over it while your central heat is running. If you do, you are going to lose energy and waste money and it will go right up the chimney.

So, the specifics of the matter. It doesn't seem to be too unreasonable—nobody has pointed out to me why the other studies that Mr. Greenhaus said supported his findings of 7500 BTU cast-off or whatever it is called was unreasonable. Nobody told me why. I don't see why it is unreasonable.

I think if I had the authority as a judge to do it, I might require that there be clarifications put in the magazine with regard to certain things that were not handled as precisely as they could have been, but I can't do that in the absence of a finding of liability. That is why I suggested you ladies and gentlemen try to settle the case.

The accuracy of the Consumers Union report, then. The burden is on the Plaintiff to prove that it is inaccurate and the proof fails. Therefore, the findings must be for the defendant, Consumers Union.

Just as an aside, I think it is kind of—both sides may have missed the—well, enough said about that subject.

The scuffle, the struggle or scuffle, fight, whatever it is called. The young man—I don't know how young he is, but the young man here from the AP—I believe the young man. I think he is telling the truth. I think he called it like he saw it; got no motive. As a matter of fact, my reading of the article, if it is critical to anyone, it is just as critical to Mr. Berliner as it is to Dr. Cranberg. It takes two to fight, if that's what it was. It takes two to struggle. If it implies hat Dr. Cranberg was childish or irresponsible, it says the same thing about Dr. Berliner or Mr. Berliner. I think what happened in the heat of the moment, that, Dr. Cranberg, you felt wronged and I think Mr. Berliner felt wronged over the thing. I think the dispute had grown disproportionate to the possible resolution of it and became beyond repair pretty quickly there at this convention and that in the heat of the moment not only was there a struggle over a tape recorder but there was probably language used that hasn't been revealed in court. That is they way I see it. I don't say that anybody has deliberately lied in court or been untruthful with me. I just don't think that when things happen in the heat of the moment the participants, especially the one who seems most aggrieved is the best able to recollect what happened.

In any event, in the final analysis, there is no malice in the case. If I am wrong about the truth of the article, if I am incorect about that, even to a gross extent, completely wrong, the figures are entirely reversed, I just don't see any malice. I just don't see any malice.

Consumers Union is not going to sell more by disparaging a product than they are going to by standing up for a product, as I understand it. They sell maga-

zines because people want information about a good product to buy. They have a stake in being impartial.

If a newspaper would print something that is sensational and stretched the truth to the point of breaking, they might sell more newspapers with lurid headlines and the like, but I don't see that is the function of Consumer Reports (sic). I don't see any evidence that anybody with Consumers Union had it in for this product or any product, for that matter.

One of the gentlemen testified that these things were all done by number, that the testers didn't know who the products were. I believe that. They didn't know who these products belonged to until they got ready to write the article, and with regard to the AP and the Austin American Statesman, there is no malice, and that would be the standard in my opinion, as to the AP and the Austin American Statesman because Dr. Cranberg, rather than depending upon the Court to resolve the matter in a liable for slander action or disparagement of product action, you elected to go public yourself and address a convocation of physicists I assume from all over the United States and even called the attention of the press to it in advance. So, they responded in kind. But in any event, by you going public to the press, asking a national organization to investigate, that made you a public figure, and their subsequent writings, then, are to be tested by the standard of malice, and the young man, Sullivan, was not malicious, not a malicious person, not toward you in this case.

What else can I comment on or what else do you want to hear from me on? Doctor? Lawyers? What else?

MR. DYE: A deadline upon supplementing the record so that it can be concluded. You mentioned that you would cooperate with the parties if there was to be any supplementation. For the record, we would just like for there to be a deadline for it.

THE COURT: Deadline is 5:00 p.m. on the 26th of September.

I don't want to have to file any more findings of fact or conclusions of law in this case. What else do I need to do?

MR. GEORGE: You need to find in the slander and the Berliner report to the Society he read there about the $1,000 a day.

THE COURT: The $1,000 a day, he gave an accurate description of what had been posted.

What else do I need comment on, Doctor?

You have got the best Fireframe. You have got the best grate ever made, Doctor. The problem with it is—there are no problems with your grate or your frame. This comparison pitted it against a fire built on a hearth; that's all. What they should have acknowledged —and I think they did acknowledge—they should have been more glowing, because your fireframe is the best that I know about, and comparing it to grates, without a doubt, comparing it to grates that have no blowers and whatever it is the best. It is better than the tubular things, right? In any event, what else do you want me to comment on?

DR. CRANBERG: I introduced a motion just before the start of this trial with respect to the violation of the Lanham Act by Consumers Union. Have you had an opportunity to examine that?

THE COURT: Yes, I did. I don't see a violation of the Lanham Act by a passing off or a disparagement, intentional harm.

DR. CRANBERG: May I make a comment, your Honor?

THE COURT: Yes, sir.

DR. CRANBERG: This admirable invention which you praised is hopefully deserving of that praise by the way in which the market responds to it, and I think that the response of the market place—I am

pleased that you appreciate the merits of the device, your Honor.

THE COURT: Well, Doctor, comparing grates, you win. My wife wanted fireplaces and in my house we have a lot of fireplaces, and I don't build fires on the hearth, every one, but for people that are willing to build a fire on the hearth, then worry with ashes and the like, that is probably the way to get the most heat, at least based on these tests, and I can't say that they are wrong, but for people who are going to use grates in their fireplaces, I think Consumers Union said yours is the best.

DR. CRANBERG: Your Honor, would you consider the following possibility?

THE COURT: I will consider anything.

DR. CRANBERG: I am going to address the National Academy of Sciences. They have taken a very keen interest in the preliminaries of this case, and I believe significant national interests are involved. Wood burning—

THE COURT: Doctor, let me give you a piece of advice.

DR. CRANBERG: Please.

THE COURT: If you will forget about national interests, if you will forget about great overriding matters of policy, and go do the very simple thing—forget about the interrelationship between Mr. or Mrs. Carpatkin or son and daughter and the sinister overtones of these kinds of things and go out and have your product tested —

DR. CRANBERG: It has been your Honor.

THE COURT: Well, Doctor, I don't know; there has not been sufficient test in this record in my judgment—to test it against a fire built right on a hearth. Do that very simple thing, by the National Academy of Sciences or these professional services. Who are they? Some of them I hear about in products liability

cases, whatever. There are 3 or 4 basic testing companies, enginering testing companies.

DR. CRANBERG: The suggestion I was going to make, the reason I brought in the National Academy of Sciences is not because I was trying to be highfalooting—

THE COURT: I am not saying you are being highfalooting or anything. What I am telling you is what has been overlooked in this case, Doctor, is the very simplest of things. This whole case got started in perhaps anger, misunderstanding, I don't know, but it comes down to trial right here and now, and your opponents are the only people that have tested it and given me the results and explained the test with engineers in this court room.

DR. CRANBERG: I incurred expenses of about $2,000 in response to your interest in tests and I retained this firm in Utah—

THE COURT: Apparently, you were very disappointed in them.

DR. CRANBERG: No, sir. I was extremely pleased by the results. Perhaps I was a little too stiffnecked with respect to the fact that the gentleman mislead me with respect to his credentials. I'd like to introduce those results into the record. I have no motive whatsoever to withhold them. There is nothing in the results which is unfavorable to my product in any way.

THE COURT: You may supplement the record, each side. When you supplement the record, you need to call my attention to what you are putting in. If it will change my opinion, I will tell you.

DR. CRANBERG: In connection with what I mentioned with the National Academy of Sciences Service, one of the great problems involved in the evaluation of these devices is a protocol, a set of criteria for testing which will be both verifiable and meaningful in relation to the consumer market place. Until such a proto-

col is established, it will be possible to weaver around the vital issues, and if I may say so, in no disrespect to the defendants or to muddy the waters, I feel that the important thing to do is to establish a protocol and identify a neutral party who is thoroughly competent. This report on cancer, a 19" color TV is generally competent, and I feel that one of the ways that this could be done would be by the appointment of a master by the Court, perhaps with a nomination from the Academy, for the purpose of generating a protocol, meaningful test procedure—

THE COURT: Doctor—

DR. CRANBERG: —and report back to the Court.

THE COURT: Doctor, this case is over with; this case is finished. You are talking about where to go from here. It seems like you have got two options: number one, justifiably claim that you are the best grate around and fight Consumer's Union with support of that fact.

DR. CRANBERG: Surely, you are jesting, your Honor.

THE COURT: I am not jesting with you, Doctor. That is the problem with the case. I don't think we really understand. Consumers Union supports your claim that that is the best firegrate in the world. They just say that building the fire not on the grate but on the hearth is better. So, if you want to make the challenge, you can take this article and go forth to the world and claim that Consumers Union supports your firegrate. Am I right about that? Isn't that what this article says?

MR. GEORGE: Twice as good as the standard grate; that is what it says.

THE COURT: And a lot better than the things that are tubular, too, unless they have a blower in them.

MR. GEORGE: Better than that, too; that's what the numbers say.

THE COURT:So, here is the choice, Doctor. Here is the way I see it. You have a basic choice. You can march forward with Consumers Union as your weapon in the sale of a firegrate to people what want to build their fires above the hearth and you've got to win. It's a compliment.

Now, if you want to prove that your grate is better than no grate, that is a different matter. You are still going to knock heads with Consumers Union and this article and other scientists. You follow me?

DR. CRANBERG: I follow you, sir.

THE COURT: The choice is yours, but as to this case, as to this case, in a contest between a grate above the ground and one built on the hearth, the burden has not been carried and it is time to draw the matter to a close. Case dismissed with prejudice. Get everything filed by September 26th, 5:00 p.m. Point out to me what you are filing. If it changes my mind, I will notify you.

DR. CRANBERG: Your Honor, would you be kind enough to explain "with prejudice"?

THE COURT: That means that this issue as between these parties shall never be litigated again. If you want to try it again, file notice of appeal and carry the case to the Fifth Circuit, Doctor.

MR. DYE: In connection with the findings, your Honor, can we request a finding that the story, the AP story, in its totality is a fair and accurate rendition of what transpired at the meeting as a finding of fact?

THE COURT: Yes, it is a fair and accurate rendition.

MR. DONALDSON: May we have that finding as to the Austin American Statesman?

THE COURT: Yes, sir. Good luck. God bless. I wish everybody could win. I am sorry you can't. Court is in recess. Make sure we have all the exhibits for this record. If you take any out, leave a receipt.

Court Reporter's Certificate

I, Blake W. Stevens, Jr., Official Court Reporter, United States District Court, Western District of Texas, do hereby certify that the foregoing pages 1 through 12 constitute a true and correct transcript from my stenotype notes the Court's rulings in the case of Lawrence Cranberg vs Consumers Union/Associated Press and Austin American Statesman in A81CA-496 and A82CA208 held Sept. 14, 1983.

Witness my signature in the city of San Antonio, Texas this 16th day of September, 1983.

Blake W. Stevens, Jr.
Official Court Reporter
United States District Court
Western District of Texas
San Antonio Division

Appendix A2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LAWRENCE CRANBERG

vs. A-81-CA-496

CONSUMERS UNION

FINAL JUDGMENT

On the 13th day of September, 1983, came on to be heard the above entitled and numbered cause and Lawrence Cranberg, the plaintiff, appeared in person and acting *pro se* and announced ready for trial and Consumers Union, the defendant, appeared by and through its respective representatives and attorneys of record and announced ready for trial and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that the plaintiff should take nothing by this suit.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the plaintiff take nothing by this suit, that defendant be in all things discharged, and that the above entitled and numbered cause be, and hereby is, dismissed with prejudice to the refiling of same. All costs of court are taxed against the plaintiff for which let execution issue.

All relief not expressly granted herein is denied.

SIGNED this 19 day of Oct., 1983.

Fred Shannon
United States District Judge

Approved as to Form:

Lawrence Cranberg, *pro se*

Graves, Dougherty, Hearon
& Moody
2300 InterFirst Bank Tower
Austin, Texas 78701

By: R. James George, Jr.
Attorneys for Defendant
Consumers Union

By: Todd N. Wade
for telephone authorization

2115J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LAWRENCE CRANBERG

vs. A-82-CA-208

ASSOCIATED PRESS and
AUSTIN AMERICAN STATESMAN

FINAL JUDGMENT

On the 13th day of September, 1983, came on to be heard the above entitled and numbered cause and Lawrence Cranberg, the plaintiff, appeared in person and acting *pro se* and announced ready for trial and Associated Press and Austin American-Statesman, the defendants, appeared by and through their respective representatives and attorneys of record and announced ready for trial and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that the plaintiff should take nothing by this suit.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the plaintiff take nothing by this suit, that defendants be in all things discharged, and that the above entitled and numbered cause be, and hereby is, dismissed with prejudice to the refiling of same. All costs of court are taxed against the plaintiff for which let execution issue.

All relief not expressly granted herein is denied.

SIGNED this 19 day of October, 1983.

Fred Shannon
United States District Judge

Approved as to Form:

Lawrence Cranberg, *pro se*

Brown, Maroney, Rose, Baker
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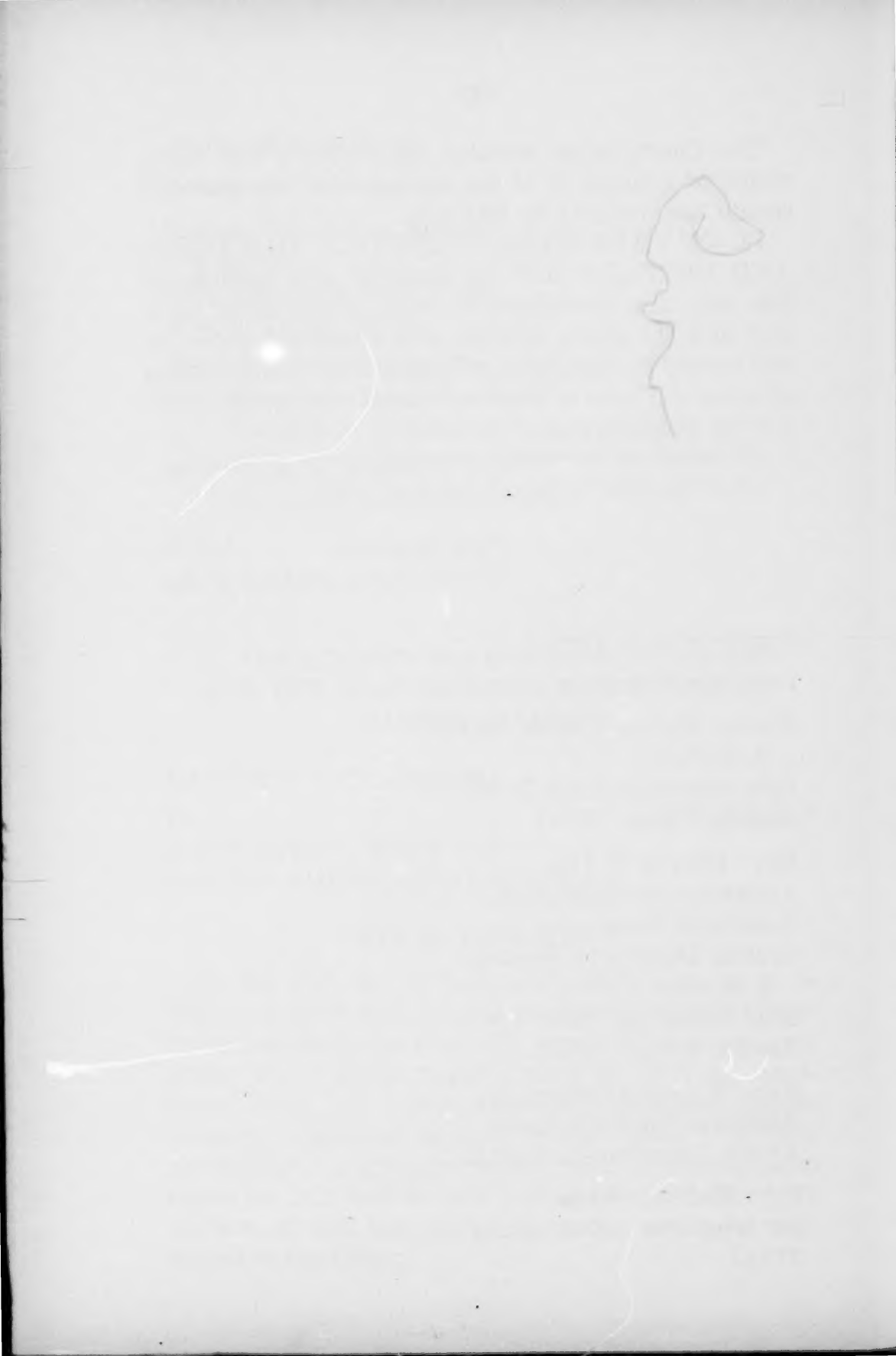
By: R. James George, Jr.
Attorneys for Defendant,
Austin American-Statesman

By: Todd H. Wade
per telephone authorization
2114J



Appendix A3

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LAWRENCE CRANBERG

vs. CIVIL ACTION NO.

CONSUMERS UNION OF U.S., Inc. A-81-CA-496

ORDER

Came on for decision plaintiff Lawrence Cranberg's Motion to File Supplemental Complaint. Having considered such motion and the fact that a trial on the merits of said cause has been held and a decision by this Court rendered, and being of the opinion that the plaintiff's Motion should denied, it is accordingly

ORDERED, ADJUDGED and DECREED that plaintiff plaintiff's Motion to File Supplemental Complaint is hereby DENIED.

Signed this 21 day of Sept., 1983.

Fred Shannon
United States District Judge

Appendix A4

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83-1912

D. C. Docket Nos. CA-A-81-496 and CA-A-82-208

Lawrence CRANBERG,
Plaintiff-Appellant,

v.

CONSUMERS UNION OF U.S., INC.,
Defendant-Appellee.

Lawrence CRANBERG,
Plaintiff-Appellant,

v.

ASSOCIATED PRESS and Austin American Statesman,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before CLARK, Chief Judge, WISDOM, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel and Dr. Cranberg;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-ap-

pellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

April 1, 1985

ISSUED AS MANDATE: May 24, 1985

OP-JDT-9
Rev. 2/85

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By Della M. Jones
Deputy

New Orleans, Louisiana

MAY 24, 1985

Lawrence CRANBERG,
Plaintiff-Appellant,

v.

CONSUMERS UNION OF U.S., INC.,
Defendant-Appellee.

Lawrence CRANBERG,
Plaintiff-Appellant,

v.

ASSOCIATED PRESS and
Austin American Statesman
Defendants-Appellees.

No. 83-1912.
United States Court of Appeals,
Fifth Circuit.

April 1, 1985.

Owner of manufacturer of fireplace grate brought diversity actions for product disparagement and libel

against publisher of consumers' magazine, which published article critical of grate, and for libel against newspaper wire service and newspaper. Cases were consolidated for trial on issue of liability alone. The United States District Court for the Western District of Texas, Fred Shannon, Jr., J., entered judgment in favor of all defendants, and owner appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) record supported finding that both wire service account of altercation between inventor and representative of consumers' magazine during scientific meeting and newspaper's published account of altercation based on wire service account were fair and accurate; (2) record supported finding that remarks by representative of consumers' magazine at scientific meeting accurately described inventor's communications to publisher of magazine, and thus could not be libelous; and (3) record supported trial court's conclusion that consumers' magazine's tests of a number of fireplace devices to determine their efficiency as domestic heat sources were an accurate approximation of performance of fireplace add-ons for consumers, including fireplace grate.

Affirmed.

1. Federal Courts—844

A reviewing court should respect credibility choices made by fact-finder.

2. Libel and Slander—112(3)

In libel suit, record supported finding that both wire service account of altercation between inventor and representative of consumers' magazine during scientific meeting and newspaper's published account of altercation based on wire service account were fair and accurate.

3. Libel and Slander—54

Under Texas law, truth is an absolute defense in

defamation actions. Vernon's Ann.Texas Civ.St. art. 5431.

4. Libel and Slander—112(3)

In libel action, record supported finding that remarks by representative of consumers' magazine at a scientific meeting accurately described inventor's communications to publisher of magazine, and thus could not be libelous. Vernon's Ann.Texas Civ.St. art. 5431.

5. Libel and Slander—21

Owner of business manufacturing fireplace grate, although not mentioned by name in consumers' magazine article critical of fireplace grate, was nevertheless entitled under Texas law to bring libel suit in his own right, since those who knew or were acquainted with owner understood from reading publication that it referred to him. Vernon's Ann.Texas Civ.St. art. 5430.

6. Libel and Slander—112(1)

In libel action brought against publisher of consumers' magazine by owner of business manufacturing and selling fireplate grate, record supported trial court's conclusion that consumers' magazine's tests of a number of fireplace devices to determine their efficiency as domestic heat sources were an accurate approximation of performance of fireplace add-ons for consumers, including fireplace grate, and thus article reporting results was not libelous.

7. Federal Courts—937

Mere fact that district court judge was contemplating a return to private practice at time he heard and decided libel case was an insufficient assertion of prejudice, based on claim that "lame-duck" judges are subject to outside pressures that life-time tenure under Article III was designed to alleviate, to warrant new trial. U.S.C.A. Const. Art. 3, § 1 et seq.

8. Federal Courts—941

Fact that district court judge, who announced two weeks after disposition of instant case his intention to leave bench and return to private practice, did not file written findings of fact or conclusions of law did not warrant new trial, based on concern that case was unfairly expedited to reduce workload of exiting judge, where announced findings were supported by evidence, were complete in that they addressed all questions at issue, and were correct as to legal standards applied.

9. Federal Civil Procedure—1952

Conduct of a fair trial is vested in sound discretion of trial judge.

10. Federal Civil Procedure—1969

Trial judge's duty in conduct of a trial extends far beyond ruling on objections and preserving decorum in courtroom to affirmative obligation under Federal Rules of Evidence to exercise reasonable control over mode and order of interrogating witnesses and presenting evidenre so as to make interrogation and presentation effective for ascertainment of truth, avoid needless consumption of time, and protect witnesses from harassment or undue embarrassment. Fed.Rules Evid. Rule 611(a), 28 U.S.C.A.

11. Federal Civil Procedure—1969

As a common-law judge, district court judge has an overall responsibility to see that trial is just and not subject to delay; judge may question witnesses, elicit facts, clarify evidence and pace trial.

12. Federal Civil Procedure—1969

On review, challenged conduct of trial judge will be measured against a standard of fairness and impartiality.

13. Federal Civil Procedure—1969

Greater latitude should be allowed in conduct of a

bench trial than would be permitted in a trial conducted with a jury since, in the former, there is no possibility that judge's actions might improperly influence jurors.

14. Federal Civil Procedure—1969

Record supported finding that judge who conducted trial of libel action brought pro se acted skillfully and conscientiously to develop and control the proof.

15. Federal Civil Procedure—840

In libel action, trial court did not abuse its discretion in refusing to allow filing of supplemental complaint requested by motion filed five days after trial on merits was concluded.

16. Federal Civil Procedure—824, 834, 851

In exercising its discretion to grant or deny motions to amend pleadings, trial court may consider such factors as undue delay, prejudice to opposing parties, and futility of proposed amendment.

17. Federal Civil Procedure—834

Undue prejudice resulting from delay in seeking leave to amend pleadings is sufficient grounds to deny motion.

Appeal from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, WISDOM, and HIGGINBOTHAM, Circuit Judges.

CLARK, Chief Judge:

Dr. Lawrence Cranberg filed these diversity actions for product disparagment and libel against Consumers Union of United States, Inc., (Consumers Union), the publisher of *Consumer Reports* magazine, and for libel against the Associated Press (AP), and Cox Enterprises, Inc., d/b/a *Austin American-Statesman* (*American-Statesman*). These cases were consolidated for trial on the issue of liability alone. In a nonjury

trial, the district court found all defendants not liable. We affirm the finding of the district court.

I

This law suit was sparked by an article that appeared in the January 1981 issue of *Consumer Reports* magazine. Dr. Cranberg claims this article libeled him and disparaged his product, the Texas Fireframe. Cranberg is the sole proprietor of the Texas Fireframe Company, which manufactures and sells the Texas Fireframe, a grate he invented for use in building the "slot fire." Cranberg, a physicist, discovered and patented the slot fire, also known as the "physicist's fire." This fire is built by stacking logs in a double-decked arrangement with a larger log in the back. This "C" formation creater a cavity that faces the room and acts as a natural radiator, generating intense heat which is directed out into the room rather than up the chimney. The Texas Fireframe is a doubledecked grate developed and patented by Cranberg to hold the logs in the proper stacked formation.

Along with promoting his Fireframe, Cranberg has fervently waged a continuous battle against what he calls the "anti-fireplace hoax"—the belief that fireplaces are inefficient home heating sources because they draw centrally heated air out of the room and allow more heated air to escape through the flue than is sent back into the room. The record contains volumnnous examples of Cranberg's activities and writings directed toward dispelling this hoax. Throughout these efforts, Cranberg has challenged the scientific basis underlying the notion that fireplaces waste energy and has asserted that his product, the Texas Fireframe, greatly improves fireplace efficiency.

In its January 1981 issue of *Consumer Reports*, Consumer Union reviewed a number of fireplace devices to determine their efficiency as domestic heat sources. As stated in the article, Consumers Union set out "to

see if a fireplace could be modified in order to pull its weight as an auxiliary heat-provider." One of the devices tested and reported on was the Texas Fireframe.

To conduct its tests in a controlled environment, Consumers Union built a calorimeter room, a room specially designed to measure gain or loss of heat energy. Each device was tested in this room under two scenarios. One test estimated the net heat output in a "log cabin" situation, where the air supplied to the fire is not preheated. The "log cabin" output supposedly shows how much heat is provided when the fireplace is the only source of warmth. The second test dealt with the more common situation, in which the fireplace is operating in a centrally heated home. Unlike the log cabin test, this scenario supposedly accounted for the energy loss occurring from the fire's being fueled by air heated by another source.

As its benchmark for data comparison, Consumers Union built what it called a simple or "standard" fire. This arrangement had the logs placed directly on the hearth, abutting the back wall, and the front of the fireplace covered with a wiremesh screen. The measurements collected from this base case provided a point for relative comparison of the heat production data collected from the ten devices Consumers Union tested and reviewed. Upon completing its testing, Consumers Union found this standard fire, without a grate or add-on device of any kind, out-performed three of the devices it tested, including the Texas Fireframe.

The discussion of the Texas Fireframe appeared under a subheading "And sometimes you lose."[1] The

[1] The portion of the report discussing the Texas Fireframe read as follows:

> A few years back, science reporters gave a lot of attention to the "physicist's fire." A double-decked grate holds logs stacked to form a cavity that faces the room and supposedly radiates extra heat. And so it does, but not well

enough. The Fireframe's cavity, in theory a perfect radiator, proved less-than-perfect in practice. It also requires careful tending, since logs change shape while burning.

Compared with a fire laid on an ordinary one-level grate, the "physicist's fire" did show a gain in the heat output—but not enough to overcome losses introduced by the Fireframe itself. The Fireframe would produce an estimated net loss of 2500 Btu an hour in a centrally heated room, we judged. It did provide a gain of 5000 Btu per hour under "unheated house" conditions, but that's still less than you'd get from a plain open fire built directly on the hearth.

discussion noted that the Texas Fireframe, while better than ordinary grates, was not as good as Consumers Union's standard fire built directly on the hearth. The article stated the Texas Fireframe would increase the efficiency of a fireplace as compared to a regular one-level grate, but would decrease the efficiency of a fireplace in a centrally heated home as compared to a fireplace with no grate and no device.

Cranberg believed the *Consumer Reports* article to be completely in error, the testing procedures wholly inaccurate and Consumers Union a perpetrator of the anti-fireplace hoax. He alleged the article disparaged his product and libeled his business and himself.

Cranberg attempted to rectify the perceived injustice perpetrated by Consumers Union against him and his grate. Cranberg prepared a paper disputing Consumers Union's findings and testing methods and emphasizing that the grateless fire, touted by Consumers Union as more energy efficient, would not even ignite and burn efectively. Cranberg wrote to Consumers Union on January 19, 1981 to inform them he planned to present his paper, tentatively titled "Plagarism, Suppression of Evidence, and Misrepresentations in *Consumer Reports*, January 1981," at the April meeting of the American Physical Society in Baltimore. Cranberg further stated in his letter to Consumers Union that if he did not receive an appropriate re-

sponse he would mail the paper to the Society with copies to representatives of the media. When Cranberg had not received what he deemed an appropriate response by January 27, he sent an abstract of his paper to news organizations and media personalities to publicize his side of the dispute with Consumers Union. In a letter accompanying the abstract, Cranberg indicated he was challenging the publication and intended to ask the Society to initiate a a thorough study of Consumers Union. Dr. Cranberg's express purpose in sending these abstracts, and later the full text of his paper, to these news organizations was to encourage the broadcast of his paper "at least as widely as the story that had been written about [his] product by Consumers Union, [and], preferably much more."

Prior to the convening of the American Physical Society, Cranberg continued his media campaign with mixed success.[2] On the day of the Society meeting, before his presentation, Cranberg was interviewed by various news representatives. As one of these interview sessions was being conducted in the hallway outside the main meeting room, David Berliner, Director of the Office of Public Information for Consumers Union, approached Cranberg. Consumers Union had sent Berliner to the meeting to respond to Cranberg's paper. A verbal confrontation began between Cran-

[2] In February 1981, Dr. Cranberg was in New York and contacted various media representatives seeking to discuss his dispute with Consumers Union. He met with editors from *The Wall Street Journal* and *Time* magazine. *The Wall Street Journal* ran a story entitled "A Burning Issue Among Physicists: How to Place Logs in a Fireplace" and noted Cranberg would appear at the American Physical Society meeting on April 23.

After *The Wall Street Journal* story, Cranberg contacted the *American-Statesman*. The *American-Statesman* sent a reporter to interview Cranberg. Cranberg was unhappy with the interview and asked that the story not be run; it was not.

berg and Berliner. During the commotion, a fellow Society member indicated that he was being tape recorded by Consumers Union. Although it is uncertain whether the tape recorder was turned on, Cranberg, believing it was, took the recorder and began recording a message to Conumers Union denouncing surreptitious recording. Berliner tried to take the recorder away from Cranberg. Both men tugged at the machine; eventually one let go. Immediately following this confrontation, Cranberg presented his paper to the Society. Berliner followed with Consumer Union's statement. Both men were given opportunities for rebuttal.

Associated Press reporter, Chris Sullivan, was covering the Society meeting at the request of the New York AP ofice. Sullivan testified that he spoke to both Cranberg and Berliner before the meeting; he witnessed the struggle over the tape recorder, attended the meeting and heard the presentations by both Cranberg and Berliner. He interviewed both Cranberg and Berliner again after the meeting and was given written copies of the presentations made by each. Sullivan's story went over the AP wire and was published by the *American-Statesman.*

Following these events, Cranberg filed suit against Consumers Union, the AP and the *American-Statesman.* These suits were consolidated for trial and heard without a jury on the question of liability only. Dr. Cranberg appeared *pro se* at the trial and throughout this appeal. In oral findings of facts and conclusions of law issued at the concluion of the trial, the court credited Sullivan's account of what occurred between Cranberg and Berliner. The court found that the AP story, as written by Sullivan and reprinted by the *American-Statesman,* was a fair and accurate rendition of what occurred, that Dr. Cranberg was a public figure for the purposes surrounding these events and that Cran-

berg failed to prove actual malice by either the AP or the *American-Statesman.*

The district court also found the statements made by Berliner before the American Physical Society were substantially true. In addition, the district court found Cranberg had voluntarily inserted himself into a public controversy and had attempted to influence its resolution, thus making him a public figure within the limited context of the controversy with Consumers Union. Because Cranberg was a public figure, the court held he must prove actual malice which he failed to do.

As to the claims against Consumers Union, the court found Cranberg failed to disprove the accuracy of the tests reporter in *Consumers Report.* The district court also found there was no malice.

In addition to appealing the libel findings, Cranberg asserts here that the trial judge was not an Article III judge, that the court abused its discretion in denying hi smotion to amend his complaint, and that he was denied a fair trial. We address the libel isues first.

II

These events have spawned four separate libel claims: 1) a claim of libel and product disparagement against Consumers Union for a review of the Texas Fireframe in the January 1981 isue of *Consumers Report;* 2) a claim of libel and slander against Consumers Union for statements made by its representative, David Berliner, before the American Physical Society; 3) a claim of libel against the AP for its wire story about the events at the Society meeting; and 4) a claim against the *American-Statesman* for libel in reprinting the AP story.

A

We deal first with the claims against the AP and the *American-Statesman* for the alleged libel against Cranberg in the AP wire story. Cranberg's complaints

against the articles were numerous. However, he objected most strenuously to the account of the struggle with Berliner over the tape recorder, which Cranberg denies ever occurred. He also objected to the headline, "Firegrate inventor fights with consumer group official," added by the *American-Statesman*. The court found both stories "fair and accurate rendition[s]" of what transpired.

The court's findings were based in part on credibility decisions made after hearing conflicting testimony as to whether a struggle over the tape recorder actually occurred. Sullivan testified that he witnessed a physical struggle between Cranberg and Berliner over the tape recorder. Berliner testified that he and Cranberg exchanged heated comments and struggled over the tape recorder. Cranberg disputed these accounts. He insisted no struggle occurred. He introduced deposition testimony of a reporter from *Discover* magazine and of the deputy executive secretary of the Society to corroborate his version of the events. Although both witnesses mentioned a lively verbal exchange, only the Society member positively stated he never saw Cranberg's hands on the recorder. The reporter from *Discover* said he could not recall seeing a struggle, but it could have happened while he was turned away. The court chose to believe Sullivan, an impartial eyewitness, who "called it like he saw it." The court found Sullivan had no motive to be untruthful or to distort his observations. Sullivan testified that he received no directives as to what he would encounter at the meeting or what to write; he had no preconceived ideas, and he lacked any ties or bias for or against Cranberg or Consumers Union. In making this credibility choice, the court stated that "when things happen in the heat of the moment, the participants, especially the one who seems the most aggrieved" is seldom the one best able to recollect what happened.

Testimony from the *AmericanStatesman* indicated the AP story was reprinted with only minor changes. The city editor of the *American-Statesman* testified that upon receiving the AP wire story he made some minor editorial changes. He made no effort to contact Cranberg to verify the story because he had an eyewitness account from the AP, a reliable news service, which he believed was accurate. He passed the story to the copy desk where it was given the headline "Firegrate inventor fights with consumer group official." Cranberg objected to the word "fights" as an irksome misrepresentation of the events. The court looked up the word in the dictionary and found it meant, among other things, "to oppose physically, to strive for the mastery of . . . struggle, quarrel. . . ." The court's acceptance of the AP article as accurate validates the almost identical reprinting by the *American-Statesman* and the added headline.

(1, 2) A reviewing court should respect credibility choices made by the fact finder. *Levine v. CMP Publications, Inc.*, 738 F2d 660, 672 n. 19, (1984), *reh'g en banc denied*, 753 F.2d 1341 (5th Cir. 1985). "[D]ue regard shall be given to the trial judge's opportunity to observe the demeanor of the witnesses." *Bose Corp. v. Consumers Union*, U.S. —, 104 S.Ct. 1949, 1959, 80 L.Ed.2d 502 (1983). The record discloses no basis for disturbing the credibility choice made below. Furtheremore, *a comparison of the article with the documents on which Sullivan relied reveals no inaccuracies.* Thus, the trial court could have found the articles' rendition of the events were fair and accurate, and, *there is ample support for that conclusion. See Time, Inc. v. Firestone*, 424 U.S. 448, 457-59, 96 S.Ct. 958, 967-68, 47 L.Ed.2d 154 (1976).

(3) Under Texas law, truth is an absolute defense in defamation actions. Tex.Rev.Civ.State.Ann. art. 5431 (Vernon 1958); *Mitcham v. Board of Regents, Uni-*

versity of Texas, 670 S.W.2d. 371, 373 (Tex.App.—Texarkana 1984, no writ); *Traweek v. Radio Brady, Inc.*, 441 S.W.2d 240, (Tex.Civ.App.—Austin 1969, writ ref'd n.r.e.); *Gulf Construction Co. v. Mott*, 442 S.W.2d 778, 784 (Tex.Civ.App.—Houston [14th Dist.] 1969, no writ) (substantial, not literal, truth is sufficient). Because the articles were found to be true, and because truth is an absolute defense, it is unnecessary to reach the issues of whether Cranberg was a public figure or whether actual malice existed. We affirm the district court's findings as to libel by the AP and the *American-Statesman*.

B

Next, we deal with the alleged defamation resulting from Berliner's remarks before the American Physical Society. The complaint centers on Berliner's statement that "Dr. Cranberg demanded payment of $1000 a day in damages and a complete retraction. Even before we could respond to his claims, Dr. Cranberg warned us that if we failed to meet his demands, he would give a speech attacking us at this prestigious meeting." Cranberg asserts this was a misrepresentation of his actions which unfairly labeled him a blackmailer.

(4) The court found Berliner's comments accurately described Cranberg's communications to Consumers Union as shown in letters written by Cranberg and admitted into evidence. This finding is amply supported by the evidence. A review of the record establishes that Berliner's comments were substantially accurate representations of Cranberg's written communications with Consumers Union. Again, because the statements were found to be true, and because truth is a defense, Tex.Rev.Civ.State.Ann. art. 5431 (Vernon 1958), we need not determine whether Cranberg was a public figure or whether actual malice was proven.

C

(5) The claim against Consumers Union, for libel

and product disparagement in its review of the Texas Fireframe, is a more complicated issue. It is uncertain whether Texas recognizes a cause of action for product disparagement or trade libel. *Jetco Electronic Industries v. Gardiner*, 325 F.Supp. 80, 84 (S.D.Tex. 1971), *rev'd on other grunds*, 473 F.2d 1228 (5th Cir. 1973). All actions for libel in Texas are governed by statute, which defines defamation only in terms of injury to a person.[3] No other definition may be considered in determining whether a particular publication is libelous. *Id.; Deen v. Snyder*, 57 S.W.2d 338, 340 (Tex.Civ.App.—Fort Worth 1932, no writ). Although Cranberg was never mentioned by name in the *Consumer Reports* article, he may still bring a defamation action under Texas libel law. Texas courts have allowed such suits on the grounds that a false publication concerning a business or product could tend to injure the reputation of the company's owner by subjecting him to financial injury. *Jetco*, 325 F.Supp. at 84; *see also Bell Pub. Co. v. Garrett Engineering Co.*, 141 Tex. 51, 170 S.W.2d 197, 202 (1943). In *Newspapers, Inc. v. Matthews*, 161 Tex 284, 339 S.W.2d 890 (1960), the Texas Supreme Court held that under Texas libel law the owner of a business can be defamed, even though the publication does not mention him by name, when the asserted libel refers to some ascertained or ascertainable person. *Id.*, 339 S.W.2d at 893. Therefore, it is not necessary that Cranberg be named in the article

[3] Texas law defines defamation as follows:

> A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integritey, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury.

Tex.Rev.Civ.Stat.Ann. art. 5430 (Vernon 1958).

because those who knew and were acquainted with him understood from reading the publication that it refered to him. *See id.*, 339 S.W.2d at 894. Cranberg was entitled to bring this libel suit in his own right. This case is governed by Texas libel law applied pursuant to the dictates of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and it progeny. We find no eror in the legal standard applied below.

The district court ultimately found Consumers Union's tests and supporting data were reasonable; nothing pointed to their being unreasonable. The court acknowledged that the analysis done by Consumers Union could have been better, and that they could have performed more than one test for each device. However, no tests or evidence were admitted to refute Consumers Union's findings. Cranberg presented the testimony of two experts, a professor at the University of Texas and a consultant in explosives. Both said it is extremely difficult to obtain consistent results in measuring the heat output of fireplaces. They derided the fact Consumers Union tested each device only one time for each scenario. Although their testimony labeled Consumers Union's test results as unreasonable and totally meaningless, neither had performed any actual tests with the Texas Fireframe or "standard" fire. Cranberg introduced tests by an organization called Terralab whose heat output numbers on the Texas Fireframe were actually greater than Consumers Union's, but consistent when accounting for alternative testing factors. The court found the results of Consumers Union's tests were consistent with logic and observed that Consumers Union "are the only people that have tested [the Texas Fireframe] and given me the results and explained the test with engineers in this court room."

Although suggesting that Consumers Union could

have clarified certain aspects of the article, the court held the burden was on Cranberg to prove that the article was inaccurate and that he failed to carry that burden. Examples of statements pointed out by Cranberg which may have warranted further clarification include the fact Consumers Union's results refer to heat outputs in a log cabin type environment and in a centrally heated home. The article does disclose that the tests were not actually conducted in these environments, but rather under conditions which Consumers Union claimed simulated these scenarios. Although these conditions could have been more fully described if presented as a precise scientific experiment, the disclosure made in this layman's advisory publication obviously was considered sufficient by the trier of fact. That conclusion of fact is supported by the record. Cranberg criticizes the measurements obtained by Consumers Union as partly the result of circumstances it imposed. Consumers Union admitted at trial that individual consumers may observe different results under different circumstances, such as, using more or bigger logs (Consumers Union only used half of the fuel stipulated in the Texas Fireframe's instructions), outside temperature variations and height of the chimnew stack. Furthermore, the "standard" fire, against which Consumers Union compared all its data, was never adequately described in the article so that it could be reproduced. The court held that neither these defects in the article, nor others mentioned in Cranberg's brief, impinged on the truth of the *Consumers Report* article. This ultimate finding is supported by the evidence.

(6) The trial court had sufficient evidence before it to conclude that Consumers Union's tests were an accurate approximation of the performance of fireplace add-ons for consumers. Cranberg presented no scientific tests to compare the Consumers Union findings

and refute their contention that the Texas Fireframe produces less heat than a fire built on the hearth. Furthermore, the trial court correctely noted that the article does not say the Texas Fireframe is a bad grate. To the contrary, the article praises its performance in comparison to other grates. "[F]or people who are going to use grates in their fireplaces, I think Consumers Union said yours is the best. . . . Consumers Union supports your claim that that is the best firegrate in the world. They just say that building the fire not on the grate but on the hearth is better." Dr. Cranberg testified as to the energy efficiency of his device by relying on his own reduced gas bills. This did not show that the Fireframe performs beter than a grateless fire built on the hearth. In this regard, the district court aptly noted that it was Cranberg's practice to turn down the thermostat when using his Fireframe. The court found: "There has not been sufficient test in this record in my judgment—to test it against a fire built right on a hearth." No proof met this single, crucial point.

The record supports the district court's conclusion that Cranberg failed to prove falsity. Whether Cranberg was a public figure for purposes of the *Consumers Report* article is irrelevant to our review of this case, as Texas law holds substantial truth is a defense to a libel claim. *Gulf Construction Co. v. Mott*, 442 S.W.2d 778, 784 (Tex.Civ.App.—Houston [14th Dist.] 1969, no writ); *Walker v. Globe-News Publishing Co.*, 395 395 S.W.2d 686, (Tex.Civ.App.—Amarillo 1965, writ ref'd n.r.e.).

III

This case was tried on September 13 and 14, 1983. Two weeks later the trial judge announced his intention to leave the bench and return to private practice on January 1, 1984. Final judgment was entered in this case on October 19, 1983. Cranberg filed Motions

for New Trial, New Judge and for Hearing of Motions by New Judge, arguing that the judge was no longer an Article III judge. The court denied these motions. Cranberg's challenge to this ruling is frivolous.

Because Cranberg is a *pro se* litigant, we have also looked for the substance of his claim, rather than to its label as an Article III concern. Cranberg argues that "lame-duck" judges are subject to the outside presures that life-time tenure under Article III is designed to alleviate. Cranberg's theoretical assertion is unsupported by any proof that when the trial judge tried this case, or when he entered final judgment, any real conflict of interest existed.

(7) Cranberg's claim seems to assert prejudice in the hearing and deciding of his case due to the fact that the judge was contemplating a return to private practice. Cranberg suggests the judge may have been prone to side with defendants' lawyers in order to curry favor with soon-to-be-colleagues of the bar. Even when viewed as a claim of prejudice, the record is wholly devoid of proof that the judge was false to his oath of office for any period of his service. No specific incident of prejudice or favoritism is advanced, or can be found, to support this assertion. Our review of the entire record establishes that Cranberg lost a fairly tried case on an honest resolution of contested fact.

(8) Cranberg's brief also evinces an unwarranted concern that his case was unfairly expedited to reduce the workload of an exiting judge. The anouncement from the bench of findings and conclusions did include a statement that the court did not want to file written findings of fact or conclusions of law. This is not improper. The announced findings are supported by the evidence; they are complete in that they address all the questions at issue, and they are correct as to the legal standards applied. Cranberg received a proper decision promptly rendered. He is entitled to no more.

IV

Cranberg claims the court conducted the proceedings so as to favor the defendants and deny him a fair trial. A number of trial procedures were unusual. For example, the judge requested that the two Consumers Union engineers who conducted the tests at issue be the first witnesses. He then directed the defendants to proceed first in examining these witnesses. The court asked all the witnesses a significant number of questions, at times dominating parts of the examination. According to Cranberg, the judge's participation in the trial comprises 23% of the transcript. At one point, the court announced, "Everyone has a running objection to hearsay and they are all overruled." On the other hand, the court also permitted the parties to make a liberal supplementation of the record upon conclusion of trial; Cranberg admits his supplementation was "massive." Rather than demonstrating prejudice, however, the record reflects that the judge's participation and evidentiary rulings tended to assist Cranberg, a *pro se* litigant who represented himself well, though he lacked familiarity with procedural rules.

(9-12) The conduct of a fair trial is vested in the sound discretion of the trial judge. *Excel Handbag Co. v. Edison Bros. Stores*, 630 F.2d 379, 388 (5th Cir. 1980). His duty extends far beyond ruling on objections and preserving decorum in the courtroom. Though the trial judge must be neutral, he need not be a passive spectator. *Ruiz v. Estelle*, 679 F.2d 1115, 1129, *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983). He has an affirmative obligation under Federal Rule of Evidence 611(a) to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption

of time, and (3) protect witnesses from harassment or undue embarrassment." Furthermore, as a comon law judge, he has an overall responsibility to see that the trial is just and not subject to delay. *Ruiz*, 679 F.2d at 1129. He may question witnesses, elicit facts, clarify evidence and pace the trial. *Id.* On review, this conduct will be measured against a standard of fairness and impartiality. *Nordmann v. National Hotel Co.*, 425 F.2d 1103, 1109 (5th Cir. 1970).

(13, 14) Greater latitude should be allowed in the conduct of a bench trial than would be permitted in a trial conducted with a jury. In the former there is no possibility that the judge's actions might improperly influence jurors. *Ruiz*, 679 F.2d at 1130. In certain other cases, the trial judge may need to assume a greater responsibility for the direction of the trial. *See Ruiz*, 679 F.2d at 1130 (complex and protracted trial). When a *pro se* litigant, even one as skillful as Cranberg, goes to trial against a party represented by a member of the bar, the responsibility of the trial judge may warrant participation which differs markedly from what would be appropriate to a trial between adversaries represented by counsel. The record of this trial reveals a judge conscious of his duty and conscientious in its discharge. Rather than prejudicing Cranberg's position, we see the judge's efforts as attempts to enlighten it. We are satisfied that the measures taken below to develop and control the proof were reasonable and directed towards reaching a just decision.

V

(15, 16) The trial court did not abuse its discretion in refusing to allow Cranberg to file a supplemental complaint against Consumers Union raising issues under the Lanham Act. 15 U.S.C. § 1125(a). The trial court has discretion to grant or deny motions to amend the pleadings. Fed.R.Civ.P. 15(a). Cranberg's motion

to supplement was filed five days after the trial on the merits was concluded. In exercising its discretion, the trial court may consider such factors as undue delay, prejudice to the opposing parties and futility of the proposed amendment. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir.1981).

(17) Undue prejudice resulting from deelay in seeking leave to amend is sufficient grounds to deny the motion. Cranberg's post trial motion came more than 18 months after his original complaint, after discovery was closed and after all evidence was presented. *See Addington v. Farmer's Elevator Mutual Insurance Co.*, 650 F.2d 663, 667 (5th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 640 (1981). Cranberg's Lanham Act claims do not involve issues completely tried in the course of the trial. His motion did not seek to conform the pleadings to the proof. In substance, his proposed amendment would raise a new cause of action. Moreover, the proposed amendment apears futile as the Lanham Act requires false statements of fact about one's *own* product. *See Bernard Food Industries, Inc. v. Dietene Co.*, 415 F.2d 1279, 1282-84 (7th Cir. 1969); *Markel v. Scovill Mfg. Co.*, 471 F.Supp. 1244, 1253 (W.D.N.Y.), *aff'd mem.*, 610 F.2d 807 (2d Cir. 1979). The court did not abuse its discretion in refusing to allow the commencement of another action at the conclusion of this one.

The findings of fact which support resolution of the libel issues are supported by the record. The remaining issues presented are without merit. The judgment appealed from is

AFFIRMED.

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

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APPENDIX A5

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83-1912

LAWRENCE CRANBERG,
Plaintiff-Appellant,
vs.
CONSUMERS UNION OF U.S., INC.,
Defendant-Appellee

LAWRENCE CRANBERG,
Plaintiff-Appellant,
vs.
ASSOCIATED PRESS and
AUSTIN AMERICAN-STATESMAN,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion April 1, 5 Cir., 1985, — F.2d —)
(May 14, 1985

Before CLARK, Chief Judge, WISDOM and HIGGINBOTHAM, Circuit Judges.
PER CURIAM:
(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

Charles Clark
Chief Judge

Supreme Court, U.S.
FILED
SEP 6 1985

No. 85-247

In The

Supreme Court of the United States

October Term, 1985

LAWRENCE CRANBERG,
Petitioner,

vs.

CONSUMERS UNION OF UNITED STATES, INC.,
Respondent,

and

LAWRENCE CRANBERG,
Petitioner,

vs.

ASSOCIATED PRESS

and

AUSTIN AMERICAN-STATESMAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT AUSTIN AMERICAN-STATESMAN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in holding that the district court's finding that the statements about Petitioner published in the *Austin American-Statesman* were true was not clearly erroneous.

2. Whether Petitioner waived any complaints about the procedures used by the district court by not objecting to those procedures at the time.

3. Whether the Fifth Circuit erred in holding that the district court did not abuse its discretion in the procedure used to take evidence in the trial of the case before the court.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Lawrence Cranberg.

Respondents are Cox Enterprises, Inc. d/b/a The Austin American-Statesman, and The Associated Press.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT AUSTIN AMERICAN-STATESMAN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, AUSTIN AMERICAN-STATESMAN, respectfully requests that this Court deny the petition for certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 756 F.2d 382 (5th Cir. 1985).

STATEMENT OF THE CASE

This is a diversity case in which Petitioner alleged that he had been defamed by an article published in the April 24, 1981 edition of the *Austin American-Statesman* which was essentially a reprint of an article circulated by Associated Press the day before. The case was tried before the Honorable Fred Shannon on September 13-14, 1983, along with a companion case Petitioner had filed against Consumers Union. The court found that the statements published in the *Austin American-Statesman* that Petitioner complains of were true and entered a judgment for Respondents on October 19, 1983. The Fifth Circuit affirmed on April 1, 1985.

———o———

STATEMENT OF THE FACTS

Judge Clark's opinion for the Fifth Circuit accurately sets out the facts.

———o———

REASONS FOR DENYING THE WRIT

1. Petitioner waived his objections to the procedures used by the district court.

Petitioner complains that Judge Shannon conducted the trial in an unusual manner. For example, Judge Shannon required Consumers Union to go forward with proof of the truth of their article before Dr. Cranberg put on

his case and would not sustain the objections the lawyers for Respondent and the other defendants had at trial to the hearsay evidence Dr. Cranberg introduced.

It is difficult to tell what exactly Petitioner is complaining about other than the fact that the trial lasted only two days. But it is clear that Dr. Cranberg never objected to the procedures used. In fact, he agreed with them. When the court called Consumers Union's engineers as the initial witnesses, Dr. Cranberg agreed (Tr. 1-37). On the first day, Dr. Cranberg asked permission to take his expert witness out of order, which was done (Tr. 1-203). And when the trial court indicated a willingness to make a ruling at the end of the second day, Dr. Cranberg agreed that the trial court should do so (Tr. 2-271). In order to preserve any complaint about the trial proceedings, Dr. Cranberg was obligated to object at the time to afford the trial court an opportunity to decide if his action was appropriate and if not, correct the error. *See Spaulding v. University of Washington*, 740 F.2d 686, 695 (9th Cir. 1984); *Rojas v. Richardson*, 703 F.2d 186 (5th Cir. 1983).

2. The Fifth Circuit did not err in holding that the procedures used by the district court to try the case met the requirements of due process and did not constitute an abuse of discretion by the district court.

As long as the requirements of due process were met, the district court had broad discretion as to the level of his questioning of witnesses, the order that witnesses appeared, and the general method of taking evidence. *See Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *United States v. McCord*, 509 F.2d 334 (D.C. Cir.

1974) (en banc), *cert. denied*, 421 U.S. 930 (1975). And the breadth of the discretion is greater when there is a bench trial where one of the parties is pro se. *See Ruiz v. Estelle, supra.*

Here the requirements of due process were more than met. Dr. Cranberg had three months notice of the trial, he called every witness he sought to call, he cross-examined every witness called by the defendants (Tr. 2-250, Tr. 2-262, Tr. 2-224, Tr. 1-180). He was not prevented from asking any question. He took the stand himself twice (Tr. 2-132 to 2-185, Tr. 2-262 to 2-270). And every document he sought to introduce was received into evidence.

The trial was fair, efficient, and while somewhat unusual, was well within any boundary ever drawn for a federal district court in a bench trial.

3. The Fifth Circuit's conclusion that the district court's finding that the statements were true was not clearly erroneous and does not present any question as to the standard of review or other general question of law.

The essence of Dr. Cranberg's complaint about the news article that was published and circulated by Associated Press and republished without significant change was that he and Mr. Berliner did not "fight" over a tape recorder during their confrontations on April 21, 1981. The district court heard three live witnesses, two of whom, Chris Sullivan and David Berliner, said that there was a tugging match over the tape recorder and Dr. Cranberg testified that there was no such struggle. The court heard two depositions from people who said they did not see any struggle. The district court chose to believe Sullivan and

Berliner. The Fifth Circuit applied the usual "clearly erroneous" standard and correctly upheld the fact finder's finding. This Court does not and should not grant a certiorari to review evidence and discuss specific facts. *United States v. Johnson*, 268 U.S. 220, 227 (1925).

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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No. 85-247 (3)

In The

Supreme Court of the United States

October Term, 1985

Supreme Court, U.S.
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LAWRENCE CRANBERG,
Petitioner,

vs.

CONSUMERS UNION OF UNITED STATES, INC.,
Respondent,

and

LAWRENCE CRANBERG,
Petitioner,

vs.

ASSOCIATED PRESS
and
AUSTIN AMERICAN-STATESMAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT CONSUMERS UNION OF UNITED STATES, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 6, 1985

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit properly held that the district court did not abuse its discretion in the procedure used to take evidence in the trial of the case before the court.

2. Whether Petitioner waived any complaints about the procedures used by the district court by not objecting to those procedures at the time.

3. Whether the Fifth Circuit erred in holding that the district court's finding that the statements about Petitioner and Petitioner's device published by Consumers Union of United States, Inc. were true was not clearly erroneous.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Lawrence Cranberg.
Respondent is Consumers Union of United States, Inc.

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No. 85-247

In The

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October Term, 1985

LAWRENCE CRANBERG,
Petitioner,

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RESPONDENT CONSUMERS UNION OF UNITED STATES, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, CONSUMERS UNION OF UNITED STATES, INC., respectfully requests that this Court deny the petition for certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 756 F.2d 382 (5th Cir. 1985).

STATEMENT OF THE CASE

This is a diversity case in which Petitioner alleged that his product had been disparaged by an article published in the January 1981 issue of *Consumer Reports* and that he had been defamed by Consumers Union's representative before the American Physical Society. The case was tried before the Honorable Fred Shannon on September 13-14, 1983, along with a companion case Petitioner had filed against Cox Enterprises, Inc. d/b/a Austin American-Statesman, and Associated Press. The court found that the statements published in *Consumer Reports* and Consumers Union's statements at the American Physical Society that Petitioner complained of were true and entered a judgment for Respondent on October 19, 1983. The Fifth Circuit affirmed on April 1, 1985.

STATEMENT OF FACTS

Judge Clark's opinion for the Fifth Circuit fully sets out the facts.

REASONS FOR DENYING THE WRIT

1. The Fifth Circuit currently held that the procedures used by the district court to try the case met the requirements of due process and did not constitute an abuse of discretion by the district court.

Petitioner complains that Judge Shannon conducted the trial in an unusual manner. For example, Judge Shan-

non requested Consumers Union to go forward with proof of the truth of their article before Dr. Cranberg put on his case and would not sustain the objections the lawyers for Respondent and the other defendants had at trial to the hearsay evidence Dr. Cranberg introduced.

As long as the requirements of due process were met, the district court had broad discretion as to the level of his questioning of witnesses, the order that witnesses appeared, and the general method of taking evidence. *See Ruiz v. Estelle,* 679 F.2d 1115 (5th Cir. 1982), *modified,* 688 F.2d 266 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983); *United States v. McCord,* 509 F.2d 334 (D.C. Cir. 1974) (en banc), *cert. denied,* 421 U.S. 930 (1975). And the breadth of the discretion is greater when there is a bench trial where one of the parties is pro se. *See Ruiz v. Estelle, supra.*

Here the requirements of due process were more than met. Dr. Cranberg had three months notice of the trial, he called every witness he sought to call, he cross-examined every witness called by the defendants (Tr. 2-250, Tr. 2-262, Tr. 2-224, Tr. 1-180). He was not prevented from asking any question. He took the stand himself twice (Tr. 2-132 to 2-185, Tr. 2-262 to 2-270). And every document he sought to introduce was received into evidence.

The trial was fair, efficient, and, while somewhat unusual, was well within any boundary ever drawn for a federal district court in a bench trial. Any departures from usual trial procedures were for plaintiffs benefit and to respondents' detriment. As the record demonstrates the trial court took great care to ensure plaintiffs his due process.

2. Petitioner waived his objections to the procedures used by the district court.

It is difficult to tell what exactly Petitioner is complaining about other than the fact that the trial lasted only two days. But it is clear that Dr. Cranberg never objected to the procedures used. In fact, he agreed with them. When the court called Consumers Union's engineers as the initial witnesses, Dr. Cranberg agreed (Tr. 1-37). On the first day, Dr. Cranberg asked permission to take his expert witness out of order, which was done (Tr. 1-203). And when the trial court indicated a willingness to make a ruling at the end of the second day, Dr. Cranberg agreed that the trial court should do so (Tr. 2-271). In order to preserve any complaint about the trial proceedings, Dr. Cranberg was obligated to object at the time to afford the trial court an opportunity to decide if his action was appropriate and if not, correct the error. *See Spaulding v. University of Washington,* 740 F.2d 686, 695 (9th Cir. 1984); *Rojas v Richardson,* 703 F.2d 186 (5th Cir. 1983).

3. The Fifth Circuit's conclusion that the district court's findings that the statements were true and were not made with knowledge of falsity or serious doubts about their truth were not clearly erroneous and does not present any question as to the standard of review or other general question of law.

This case presented primarily fact questions for the trial court to resolve. With respect to Consumers Union, the key fact questions and credibility determinations were whether Consumers Union's tests were run and its findings accurately reported; whether Consumers Union acted with "actual malice"—i.e., that it knew that its tests were false or had serious doubts about their truth; and whether Consumers Union's presentation to the American Physical

Society concerning Dr. Cranberg was false and was made with knowledge of falsity or with serious doubts about the truth of statements therein. The trial court had ample evidence, both live and documentary, with which to conclude that Consumers Union accurately ran its tests and reported its findings without any knowledge as to any falsity, if any, therein and further that Consumers Union's description of Dr. Cranberg's actions in its presentation to the American Physical Society was substantially true and made without knowledge of its falsity or serious doubts about its truth.

It was the Fifth Circuit's responsibility to review the trial court's findings that the *Consumer Reports* article and Consumers Union's presentation before the American Physical Society were true and were not published or made with knowledge of falsity or serious doubts about their truth; it could not reverse that finding unless it concluded that it was clearly erroneous. Fed. R. Civ P. 52(a); *Anderson v. City of Bessemer City, N.C.*, — U.S. —, 105 S.Ct. 1504, 1511-12 (1985); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 857-58 (1982). The trial court's findings were based in large part upon credibility determinations and, accordingly, they must be given special deference upon appeal; *Bose Corporation v. Consumers Union U.S., Inc.*, 104 S.Ct. 1949 (1984). The Fifth Circuit properly applied the usual "clearly erroneous" standard and correctly upheld the fact finder's finding. Its holding presents no question as to the standard of review or other general question of law.

———o———

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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No. 85-247 (4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE CRANBERG,

Petitioner,

—against—

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent,

and

LAWRENCE CRANBERG,

Petitioner,

—against—

ASSOCIATED PRESS and
AUSTIN AMERICAN STATESMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ASSOCIATED PRESS IN OPPOSITION TO PETITION

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IN THE

Supreme Court of the United States

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No. 85-247

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BRIEF OF ASSOCIATED PRESS IN OPPOSITION TO PETITION

PRELIMINARY STATEMENT

Petitioner vigorously litigated his libel claim against respondent Associated Press[1] through nearly a year-and-a-half of

1 Respondent Associated Press, a news cooperative, has no parent companies, non-wholly owned subsidiaries or affiliates which are required to be named in a listing pursuant to U.S. Sup. Ct. Rule 28.1.

discovery and a bench trial. At the trial's end, the statements at issue in the pertinent dispatch were found to be true based on the trial judge's determinations of the credibility of witnesses giving conflicting testimony. Upon its review of the record, the Court of Appeals affirmed this finding and concluded, based on Texas state law, that such truth constituted an absolute defense. Further, the Court found petitioner's procedural objections to be unsupported, given the great latitude provided petitioner in presenting his case. Plainly, this case raises no significant issues, and the decisions below have no broad ranging effect. Simply put, no "special and important reasons for granting a writ of certiorari" are present. Sup. Ct. Rule 17.

COUNTERSTATEMENT OF QUESTION PRESENTED

Was the judgment in this libel suit in favor of Associated Press ("AP") proper where (1) there was substantial testimony at trial supporting the truth of the statements in the pertinent article, and (2) petitioner had sufficient opportunity to introduce at trial all of the oral and written evidence he desired?

COUNTERSTATEMENT OF THE CASE

Petitioner is the creator and promoter of a specialized fire grate which produced what he characterizes as the "slot fire." Following an article in the January 1981 issue of *Consumer Reports* critical of his "slot-fire," petitioner began an extensive campaign to interest the media in his dispute against the publisher, Consumers Union ("CU"), and to publicly discredit the article and CU's testing methods. This campaign culminated in a presentation by petitioner of a paper at the April 1981 meeting in Baltimore of the American Physical Society. In his paper, entitled "Encounter With Consumers Union," Petitioner attempted to expose the inadequacy of CU's report on his fire grate and the testing methods underlying the report. A representative of CU, David Berliner, also attended the meeting to make a rebuttal presentation.

The Associated Press sent one of its Baltimore reporters, Chris Sullivan, to cover the meeting. At the meeting, but prior to the formal presentations, he personally observed a heated argument between petitioner and Berliner which ended in a struggle over a tape recorder allegedly belonging to CU.

Based upon his observation of both the informal debate prior to the presentations and the formal presentations by Messrs. Cranberg and Berliner, the text of the statements submitted, and his interviews with petitioner and Berliner, Sullivan wrote an eighteen-sentence account of the event. A copy of this article is attached hereto as an Appendix. The article summarized both sides of the debate, as well as the confrontation between the two men and the struggle over the tape recorder. It also stated that petitioner had demanded damages from CU, and reported that petitioner had failed to provide CU, upon CU's request, with a list of the alleged errors in CU's article.

On or about April 16, 1982, petitioner brought a libel action against, *inter alia*, AP. Following substantial discovery, the case was tried on September 13 and 14, 1983 before U.S. District Judge Fred Shannon. At trial Messrs. Sullivan and Berliner described in detail the struggle over the tape recorder; petitioner conceded that he had not delivered a list of the alleged errors in CU's article to CU; and letters introduced, as well as oral testimony, attested to petitioner's demand for damages from CU.

At the close of the bench trial, the judge found in favor of AP and rendered his decision. In particular, Judge Shannon concluded, *inter alia*, that he believed the testimony of Mr. Sullivan regarding the tape recorder incident and that AP's story was a "fair and accurate rendition" of what happened at the APS meeting. Petit. at 33, 39. Following trial, petitioner was permitted to supplement the record in massive proportions. His submissions, however, did not persuade the judge to alter his ruling.

On appeal, the Fifth Circuit affirmed the trial court's ruling on two independent grounds. First, based on its review of the record, the Court found no basis for disturbing the "credibility choice" made below and found "*ample support*" for the conclusion that the article's rendition of the events was "fair and accurate." Petit. at 58 (emphasis in original). Second, the Court affirmed the finding that, under Texas law, the articles were true or substantially true and thus not actionable. *Id.* at 58-59. The Court also rejected procedural attacks on the judgment which are virtually identical to those which petitioner makes before this Court. *Id.* at 63-66.

REASONS FOR DENYING CERTIORARI

I.

ISSUES CONCERNING THE FIRST AMENDMENT PROTECTION OF SPEECH RELATING TO PUBLIC FIGURES ARE IRRELEVANT TO THE DECISION BELOW

Petitioner attempts to convince this Court to use this case to re-examine the "public figure" principles established in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Yet, as petitioner concedes (Petit. at 23), the Fifth Circuit expressly found it "unnecessary to reach the issues of whether Cranberg was a public figure or whether actual malice existed." Petit. at 59. That court based its ruling on the truthfulness of AP's article which, under Texas libel law, is an absolute defense. *Id.* at 58-59. Simply put, no Federal Constitutional issue is raised here. Petitioner's tortured attempt to manufacture an issue by returning to the trial court's unpublished ruling should be rejected.

II.

PETITIONER'S DUE PROCESS RIGHTS WERE ADEQUATELY PROTECTED IN THE PROCEEDINGS BELOW

Petitioner's procedural arguments are similarly meritless.

First, petitioner argues that he was denied deposition discovery of certain AP officers and that such denial violated this Court's ruling in *Herbert* v. *Lando*, 441 U.S. 153 (1979). Yet, the officers whom petitioner sought to depose (including AP's president and general manager), had nothing to do with the investigation, writing or editing of the article. Chris Sullivan, who was deposed extensively and who testified at trial, was the only AP employee who researched, wrote and edited the story.[2] Thus, petitioner had full opportunity to inquire into the state of mind and editorial process of the author of the article. This Court's ruling in *Herbert* v. *Lando*, 441 U.S. 153 (1979), requires no more.

In *Herbert* v. *Lando*, the Court stated:

> [T]he requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." Rule 26(c). . . . judges should not hesitate to exercise appropriate control over the discovery process.

441 U.S. at 177. Here, the facts relating to the relevance of the proposed depositions sought by petitioner and his need therefor were fully briefed and argued before the judge on AP's motion for a protective order. Given the total lack of contact between the AP officers and the article, the trial judge properly

---

2 Minor editorial changes which did not alter the substance of the story were made by AP's Baltimore office before the dispatch was sent out on the AP wire.

exercised his discretion and control over discovery in refusing to permit petitioner to subject these officers to needless depositions. Petitioner's objection to such ruling is baseless.

Second, petitioner's lengthy attack (Petit. at 21-23, 26-30) on the trial court's handling of the trial is also misguided. Petitioner, who had proper notice of the time of the trial, was granted full opportunity to present his witnesses, cross-examine the defendants' witnesses and testify himself (which he did twice). He also conducted substantial pre-trial discovery and was permitted to make post-trial submissions to supplement the record. Due process requires no more. Further, as the court below found (*id.* at 65-66), the active participation of the judge was fully consonant with the non-jury status of the trial and there is no evidence that petitioner was prejudiced by such participation. Petitioner's unsupported intimations to the contrary should be rejected.

Finally, petitioner's suggestion that Judge Shannon failed to qualify as an Article III federal judge is frivolous. During the pendency of this action, Judge Shannon properly served as an Article III district court judge as he had been duly appointed and possessed life tenure. The post-trial announcement of his planned retirement from the bench had no bearing on his constitutional qualifications or ability to complete his duties vis-a-vis this case. Indeed, the court below found no evidence of any "prejudice or favoritism" toward defendants and petitioner can show none. Petit. at 64.

In sum, petitioner was provided every opportunity to submit whatever evidence he desired, and to raise all issues, before the trial court. There is no evidence that the procedures prejudiced petitioner. The Fifth Circuit was clearly correct in concluding that its "review of the entire record establishes that Cranberg lost a fairly tried case on an honest resolution of contested fact." Petit. at 64.

CONCLUSION

For the reasons set forth above and in the decisions below, the Petition of Writ of Certiorari should be denied.

Dated: September 10, 1985

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Controversial Fire Grate Heats Up Gathering of Physicists,
By CHRISTOPHER SULLIVAN, AP

BALTIMORE (AP)—The inventor of a patented way to build a "better" fireplace fire told a national forum of scientists Thursday that he had been burned by a report on his grate that appeared in a leading consumer publication.

Lawrence Cranberg told members of the American Physical Society that a January article in Consumer Reports unfairly faulted his invention, and he asked the society to investigate the magazine's research techniques.

Assistant director David C. Berliner of The CU, which publishes Consumer Reports, called Cranberg's claim a "distortion."

As scientists quietly debated topics of more esoteric interest, Cranberg and Berliner vigorously argued during a presentation session and beforehand. At one point they physically struggled over a tape recorder placed by Consumer Reports on a table after Cranberg protested it had been "surreptitiously planted" there. "That will give you an idea of how things can be distorted by Dr. Cranberg," Berliner said. He noted that the recorder had been in plain view and was turned off.

Cranberg said the Consumer Reports article contained more than 20 "distortions, falsifications and suppressions of evidence . . ." in giving a reader an extremely unfavorable assessment of his invention, marketed by Cranberg's Texas Fireframe Co. of Austin.

He said a grateless arrangement of logs, which the magazine claimed was more efficient for heating, "won't work."

In rebuttal, Berliner said Consumer Reports—which reports monthly on product tests it performs and has a circulation of 2.9 million—has established a procedure for responding to complaints of unhappy manufacturers, which he said Cranberg had not followed.

Berliner said the magazine asks for a specific listing of errors in its stories, and Cranberg conceded he has not supplied it. He said he got no satisfaction when he tried to discuss his claims with the magazine's lawyer.

Berliner said that in a letter to CU after the article was published Cranberg "demanded payment of $1,000 a day in damages and a complete retraction" as compensation for damage already done to his business by the article.

"Even before we could respond to his claims," Berliner told the physicists group, "Dr. Cranberg warned us that if we failed to meet his demands, he would give a speech attacking us at this prestigious gathering."

Cranberg said his report to the group was only the latest of several he has made updating progress on his 1975 invention.

Claiming his fire grate has been found efficient by others who have tested it, Cranberg said it uses a 19th century heat-radiation theory and separates an upper row of logs from a bottom row. His grate and his instructions for using it are patented and copyrighted, Cranberg said.

There was no immediate response from the officials of the American Physical Society to his request that they formally investigate the CU.

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No. 85-247

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Associated Press
and
Austin American-Statesman
Respondents

Reply Brief

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether the U.S. Court of Appeals for the Fifth Circuit was correct in giving its unqualified endorsement to the Anti-Fireplace Hoax (i.e., that a fireplace cools rather than heats an interior space in winter, and specifically that such is the effect of using Petitioner's appliance, the Texas Fireframe grate).

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No. 85-247

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"Constitutional law is something we all share, and the gaps between science, politics, and the law can be bridged only if we encourage everyone (to take part)".

Remarks of Justice Sandra Day O'Connor in Austin, Texas, reported in *Austin American-Statesman* for Sept. 16, 1985.

Introduction

With the onset of the energy crisis of the seventies, great attention was focused on the use of wood as an alternate to fossil fuels. There was a surge of innovation in the field of wood-burning appliances and at the same time the emergence of high-pressure methods to channel consumer demand to high-priced products. The most remarkable of those high-pressure methods was what plaintiff has called "The Anti-Fireplace Hoax"—the contention that the fireplace is energy counter-productive and should be replaced by a stove or fireplace insert.

The fireplace industry consists of many small producers, most of them with only rudimentary technical staffs, and it has fallen to the plaintiff in this case to become, in effect, the spokesman for the entire industry in exposing the Anti-Fireplace Hoax. The fact that he carries this heavy burden pro se is simply the result of the fact that when Consumers Union struck at his Texas Fireframe grate, it was in a very early stage of introduction into the market, and with the limited resources which had been accumulated, pro se was the only economically practicable means of litigating CU's libelous attacks. Thus, while pro se litigation usually is a reflection of narrow interests reflecting limited public concerns, the contrary is the case here, where circumstances have projected a lone scientist in the role of champion and defender of man's oldest invention still in general use in essentially its primitive form—the wood-burning fireplace, and involves the interests of millions of home owners and billions of dollars of annual consumer investment in appliances and in wood fuel.

It is therefore of utmost importance that this Petition by a pro se party not be brushed aside as an expression of petty interests by a lone eccentric, but that it receive deliberate attention commensurate with the vast public interests which are actually involved.

It has been a consistent feature of the strategy of the defense to focus attention on the pro se aspect of this litigation. Clearly, the intent has been to denigrate the importance of this action, and the strategy has been extremely effective in the two lower courts, where it has received only minimal attention. It is therefore no surprise that the defense, in its Opposition to this Petition, continues that strategy, belittling the plaintiff and his cause. But the neglect at the lower levels is precisely the cause of the errors at those levels, and calls for special attention by the U.S. Supreme Court to this Petition and Reply.

While Consumers Union has been the instigator of this action, and the other two defendants have been seemingly ensnared by its attempts to discredit the plaintiff by public attacks on his character, those other two defendants have been ardent seconds in this litigation, as the AP Opposition forcefully shows, where it carries the burden alone on several of the procedural issues raised in this litigation.

Not only have those defendants been ardent seconds in this litigation, but they proved to be ardent seconds in CU's attempts to becloud the scientific and technological questions involved by recourse to patently diversionary libels of their own invention: the physical struggle over a tape recorder, the allegations that the plaintiff withheld information on his complaints and that he sought to blackmail CU. It will surely impress the common-sense of the Court that these are transparently diversionary in intent, diversionary in effect, and can serve only one purpose other than the defamation of the plaintiff himself—namely, the need of CU to distract attention from its folly in embracing the Anti-Fireplace Hoax. The fact that the media generally have been the principal means by which that Hoax has been propagated for this past decade explains

the eagerness of AP and A-AS to discredit the plaintiff and to throw their weight behind CU.

It should be a particular concern of the U.S. Supreme Court that what is involved is much more than "saving face" by media acting in concert in accordance with the "unwritten laws" by which colleagues protect each other. What is involved is the continuing concealment by the media of facts about the consequences of the Anti-Fireplace Hoax which have direct effects of the first magnitude on public health and safety.

Thanks to media promotion of the Anti-Fireplace Hoax, there are ten million wood-stoves in American homes, which according to a leading trade journal (R102) and to the cognizant federal agencies are so many "time bombs" waiting to ignite chimney fires, and which spew dangerous pollutants into the atmosphere. What is fundamentally at issue in this case is the resolve of the media to conceal the Anti-Fireplace Hoax and their promotion of it as the key to the high-pressure selling and distribution of one of the most dangerous products ever to penetrate American homes on a large scale.

Surely there are few more effective means of bringing the foregoing facts to public attention than the granting of this Petition, and a proper trial of the issues in these cases.

I. Cranberg v. Consumers Union of the United States, Inc.

The following responses are entered in reply to the Opposition to Petitioner's Writ of Certiorari, the numbers below referring to like-numbered sections of said Opposition.

1. Respondent's claim that "the breadth of discretion is greater where there is a bench trial where one of the parties is pro se" is not supported by the case cited. *Ruiz v. Estelle* is *not* a pro se case.

Although Dr. Cranberg took the stand twice, he was never permitted to testify freely but was under constant interrogation and harassment by the court, which accounted for 23% of the transcript record. The fact that no cross-examination of Dr. Cranberg's testimony by opposing counsel ever took place speaks to the character of the proceedings.

The suspension of the Rules of Evidence barring hearsay has no precedent or justification in any case cited or in the Rules themselves, which nowhere make special provision for pro se parties. The attempt by respondents to insinuate such a provision is an intolerable abridgment of due process which should be stopped in its tracks.

The statement that "every document he sought to introduce was received into evidence" merely means that the Court, which never entered findings of fact or law and never cited any documents in its findings, did nothing more than attach a sticker to a document and declare it "entered." And even this empty ceremony was dispensed with so far as the supplementary exhibits were concerned. These were submitted by both sides and thereafter sank without a trace in any court finding or even in the official list of court Exhibits.

So blatant was the prejudice of the judge that the plaintiff was forced to say near the end of the first day (Tr. 1-249) "I beg you not to prejudge this matter."

2. Petitioner never waived his objections to the procedures used by the district court. Those procedures were inherently misleading and contradictory. Thus the court

gained petitioner's agreement to allowing the defendant Consumers Union to put on its case first by stating that its report "does in fact disparage the Texas Fireframe" (Tr. 1-37), and then proposed to call CU's "engineers" to substantiate their disparagement. But at the conclusion of trial, the court found that CU's report was not disparaging but that it was so favorable to plaintiff that "you can take this article (the CU report) and go forth to the world, and claim that Consumer's Union supports your grate" (Tr. 2-282). Thus a prima facie case of libel was turned on its head and no orderly trial of the issues ever took place.

There being no expert witnesses for the defense and no bar to admission of hearsay, the court's decisions were merely a set of personal opinions with no standing in law. The Court's opinions on the meaningfulness of CU's tests, for example, were purely judicial testimony (Tr. 2-273-274). The same is true at Tr. 2-37, where the court asks "Is it true or false? You are not going to prove it is false by this witness." The latter words were uttered after a fatal concession by CU's witness falsifying CU's report that the Texas Fireframe was a "loser." Under Federal Rule of Evidence 605 ,objection need not have been taken, but strong exception was in fact taken.

With a judge acting as his own jury, advocate and expert witness, delivering interim pronouncements on testimony which had no relationship to that testimony, the proceeding was an embarassing travesty of due process and could not end soon enough so far as plaintiff was concerned. Plaintiff's complaint is not that there was "only" a two-day "trial," but that there was no trial at all in any operationally meaningful sense of that term.

3. The Court of Appeals did not merely uphold the lower court. Where the lower court was obviously distressed by the inadequacy of CU's tests and sought to shore up its findings by finding no malice, the Court of Appeals performed an effective de novo evaluation of the evidence and concluded that CU's report was correct. Thus the Court of Appeals effectively supplanted the lower court as

fact-finder and reached a materially different conclusion on the critical question of the efficacy of fireplaces as heat sources. The Court of Appeals had no warrant for such a usurpation of the powers of the lower court. This case accordingly differs from *Bose v. Consumers Union*, where de novo review dealt with a determination which affected the outcome on a constitutional question.

Here the Court of Appeals was effectively trying to keep the question of malice and *New York Times Sullivan* from being carried forward, but instead those questions remain and there is in addition an appealable question of unwarranted encroachment on the fact-finding power of the lower court.

CU's contention that there was a "trial" is on a par with its claim that the fireplace is effectively a refrigerator of an interior space in cold weather—a contention more absurd than that the earth is flat or that it is the center of the universe, since the latter two statements can be reconciled with simple-minded observation but CU's findings cannot be so reconciled. Even man's household animals recognize that absurdity by warming themselves at the fireside in cold weather. The fact that CU's contentions have passed muster with two lower levels of the federal judiciary will stand as a permanent embarrassment to our federal courts which can only be extenuated by reversal or remand.

II. Cranberg v. Associated Press

Comparison of AP reporter Sullivan's story of 18 sentences with plaintiff's "Encounter with Consumers Union" (R3, R43) will fix in the mind of the reader the meaning of the lower courts when they held his story to be "fair and accurate." That is an opinion which should have been testified to by expert witnesses, and although one was in the trial courtroom, he was never called. The need was filled by the presiding judge, who was a self-constituted expert on heat transfer, combustion, and journalism, Rule 605 Federal Rules of Evidence, notwithstanding.

The obvious interpretation of Sullivan's performance is that the "young man," who had been with AP only two months when he wrote his story at the direction of AP's New York headquarters, was under instructions to obliterate what Dr. Cranberg had to say. But the lower court refused, despite *Herbert v. Lando*, to permit any investigation into those instructions, just as it refused to permit any investigation into the Sullivan-Berliner meeting at AP's Baltimore headquarters, and just as it refused to permit any discovery of any investigations AP's New York and Baltimore offices must have made in response to Dr. Cranberg's immediate and vociferous complaints about Sullivan's story. The right to discovery of complaint reviews has been firmly established by *Federal Trade Comm. v. TRW, Inc.*, which had been cited in pre-trial briefs to no avail. Their being withheld is an act of conspiracy with the approval of the lower courts.

The two basic elements of defense strategy in this case have been to obstruct discovery and to establish that the plaintiff is a "public figure." Three Motions for Summary Judgment and a Motion for Interlocutory Appeal under Rule 1292(b) failed to achieve their immediate objective, but the lower court eventually did make the plaintiff a public figure. Yet now AP characterizes as "tortured" the raising of the public figure question in this Petition!

Clearly, what is "torturing" to AP is the possibility that their tactics have backfired, and that with evidence of a

shift in Supreme Court opinion with respect to *New York Times v. Sullivan*, they may have set the stage for the reversal of that decision. No doubt the Court will soon relieve AP of its agony.

Few more suitable occasions for review of *New York Times v. Sullivan* could be presented to the Court. The substantive issues of public health and safety are of first magnitude, and the culpability of the media could hardly be more evident. AP's defiance of the above-cited discovery precedents and its defiance of Rules 26(b)(2) and 37(g) speak to the arrogance of power which has afflicted our media since *New York Times v. Sullivan.*

Media hoaxes are not new. See "Hoaxes," by C. J. MacDougall. Nor is superstition new to our media. See "Superstition and the Press" by C. J. MacDougall. But the continued flourishing of these absurdities in an age of science and reason is an anomaly which clearly points to the need for more critical media reporting and editing. And surely *New York Times v. Sullivan*, with its encouragement of "uninhibited, robust, and wide-open" news coverage was a signal in precisely the wrong direction, and a new direction is clearly called for.

III. Cranberg v. Austin American-Statesman

Of the 530 pages of trial transcript, just seven pages are devoted to the trial of the *Statesman* phase of the case. But the following will give some indication of what a proper trial would have brought out.

The *Statesman*, under previous, conservative, business-oriented management, had been a consistent source of strong media support for its home-town inventor and his work. The sudden turnabout marked by the CU story followed a transformation of management which put far-left elements in control of newspaper news and editorial policy. Testimony to that effect was produced in part (R101) and in part was precluded by obstruction of discovery. But the open facts are telling in themselves. The *Statesman* was the only newspaper in America that had a copy of Dr. Cranberg's paper when it ran the AP story. Yet it ran the story with the most defamatory headline used in any newspaper in America. And it omitted the one sentence of the AP story which reflected adversely on CU—namely, that its "Standard Fire" was inoperative. That such a story was ruled "fair and accurate" speaks to the state of our media and of some of our lower courts, and clearly calls for acceptance of this Petition.

Conclusion

The granting of this Petition for Writ of Certiorari is respectfully requested.

Respectfully submitted,

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Lawrence Cranberg, pro se